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CASE NO. 276

In the Supreme Court of the United States

OCTOBER TERM, 1965

REED R. MAXFIELD and
JOHN R. CHRISTOPHER,
Petitioners,

vs.

UNITED STATES OF
AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on the 22nd day of April, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F.2d ..... A copy of the opinion is attached hereto as Appendix A. No opinion was issued by the District Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The judgment of the United States Court of Appeals for the Tenth Circuit was entered April 22, 1966. On the 24th day of May, 1966, an Order was issued by the above Court extending to June 21, 1966, the time for filing a petition of certiorari. Jurisdiction to review the judgment in question by writ or certiorari is invoked under Rule 37, Federal Rules of Criminal Procedure and applicable rules of this Court.

QUESTIONS PRESENTED

The Court of Appeals affirmed a judgment entered on a jury verdict convicting Petitioners because it found no error in the proceeding of the Trial Court. Petitioners were tried under an indictment returned in the District of Utah. Petitioners were charged in the first eight counts of the indictment with violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77(q); in Counts Nine and Ten violations of the Mail Fraud Statute, 18 U.S.C. 1341; and in

Count Eleven with a conspiracy to violate the anti-fraud provisions of the Securities Act and the Mail Fraud Statute in violation of the Conspiracy Act, 18 U.S.C. 371. On February 4, 1965, the jury found Petitioners guilty of the first eight counts of the indictment, and not guilty on Counts Nine, Ten and Eleven of violating the mail fraud and conspiracy statutes. The undisputed facts show:

a) That Petitioner Reed R. Maxfield (hereafter "Maxfield") was President of Uinta Finance Company and chairman of its board (hereafter "Uinta Finance"), which decided in 1958 to form an insurance company, Uinta National Life Insurance Company (hereafter "Uinta National");

b) The officers and directors of Uinta Finance subscribed to 10,000 shares or 400,000 units of Uinta National stock for $147,770 for which they paid $10,000 down. About five months later Maxfield and his brother borrowed $125,000 from Uinta Finance and with these proceeds paid for most of the foregoing shares of Uinta National stock in order to qualify Uinta National as a Legal Reserve Insurance Company. Uinta National also received its solicitation permit from the Utah Insurance Commissioner to commence selling insurance;

c) The Maxfields, about six months after they borrowed the foregoing amount, repaid it by delivering to Uinta Finance 242,000 units of Uinta National stock. This transaction was an arms-length transaction executed pursuant to a resolution of the Board of Directors of Uinta Finance (R. 291, 416). Maxfield left the Board of Directors' meeting while the directors voted

to purchase the stock and cancel the above described note;

d) Uinta Finance, pursuant to a resolution of its Board of Directors offered to sell and contracted for the sale of some of the securities it had acquired from Maxfield and his brother. Uinta Finance negotiated with various prospective stock purchasers for the sale of a block of its stock (R. 1009-18). Negotiations culminated with a contract with Western States Underwriters, Inc. (hereafter "Western States") wherein it agreed to sell 135,365 units of its stock to Western States for $1.14 per unit. The shares were to be delivered to Western States upon payment of the agreed unit price.

e) Uinta National stock was trading in limited quantities at $1.27 per unit when Western States purchased its stock from Uinta Finance.

f) John R. Christopher (hereafter "Christopher") had known Maxfield as early as 1956 when Maxfield formed and sold stock in Uinta Finance. From 1956 to and including the time when the charges were allegedly committed, Christopher acted as a stock salesman or stock sales manager for companies of which Maxfield was President;

g) In March of 1959 Christopher incorporated Western States (Ex. 3). Western States was duly licensed with the Utah Securities Department as a broker-dealer;

h) Uinta Finance earned a profit of approximately $27,000 on the sale of its Uinta National stock acquired from Maxfield.

i) Western States sold the Uinta National stock to the public on installment contracts.

j) On September 27, 1960, during the investigation by the Securities and Exchange Commission (hereafter "SEC"), Christopher's deposition was taken. The interrogations related to the fund shortages of Western States and the reason it had not delivered the stock it had sold to its customers. Christopher in his deposition was induced to testify by the SEC's promise of reward or other benefits. He was told by the SEC investigator that they were not after him and that he was "a small fish" and, in fact, that the Commission was after Maxfield (R. 1166, 1173); Maxfield was not present at the time the deposition was taken, did not know it was being taken, did not know the time or place of taking, and had no opportunity to cross-examine the witness.

k) Christopher answered questions in his deposition with the view of fixing the blame of his predicament of misapplication of approximately $83,000 on Maxfield. However, Christopher, one month and eight days after his deposition was given, refuted his statement that Maxfield had any part of the Western States operation (R. 1180 and 1181).

The questions are:

a) Did the Trial Court violate guarantees of due process or commit other error in permitting the Government to read the deposition-confession of Christopher into the record over Petitioners' objection?

b) Should the conviction of Maxfield be permitted to stand when he was convicted on hearsay evidence?

c) Is the verdict contrary to the evidence and the law and is it inconsistent with itself?

d) Should Christopher's deposition, which was tantamount to a confession, have been admitted in evidence without first striking or deleting all references to Maxfield?

e) Did the Trial Court err in instructing the jury that a misrepresentation of law could be considered by them in determining the guilt or innocence of Petitioners and in permitting the admission of evidence concerning alleged misrepresentations concerning the law?

f) Did the Trial Court err in permitting the Government to question Maxfield on cross-examination relative to his conclusion concerning why his brother had purchased a security business, Mid-America, when Maxfield had no competent knowledge concerning the matter?

g) Did the Trial Court err in permitting the Government to cross-examine Maxfield relative to mergers occurring in 1961 and 1962, dates subsequent to the alleged crime with reference and emphasis on the large amount of money he and others received therefrom?

STATUTES INVOLVED

The Statutory provisions involved are 15 U.S.C. 77(q); 18 U.S.C. 1341 and 18 U.S.C. 371. These Statutes are set out in an Appendix B.

STATEMENT

This was a criminal action brought by Respondent against Petitioners who allegedly violated the above cited Statutes. Petitioners were charged under an indictment which contained eleven counts. The first eight counts charged violations of Section 77(q), Title 15, United States Code, and Section 17(a) of the Securities Act of 1933 which provide:

> "It shall be unlawful for any person in the offer or sale of any securities or the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly:
>
> 1) to employ and devise, scheme, or artifice to defraud or,
>
> 2) to obtain money . . . by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements, made, in light of the circumstances under which they were made, not misleading, or
>
> 3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchasers."

Count One lists in subheadings (1) through (16) a series of alleged misrepresentations and in a second series of nineteen subheadings lists fraudulent concealment of alleged material facts.

The remaining seven of the first eight counts simply reiterate the same charge contained in Count One and charge a separate offense in each count by alleging that the identical fraudulent misrepresenation of fraudulent

failure to disclose was made or concealed to or from the different individuals named. Thus Counts One through Eight are identical, with the exception of naming the individual allegedly defrauded.

Counts Nine and Ten charge violations of Section 1341, Title 18, U.S.C.A. which makes it a criminal offense to devise a scheme or artifice to defraud by selling any security my mail. The only difference in the charge contained in the two counts thus charged was in the names of the individuals allegedly defrauded.

The final Count, Eleven, charged the Petitioners as follows:

> "During the times previously alleged in Count One (Count One through Eight are the same in this respect) of the indictment, the (Petitioners) . . . did conspire, combine, confederate and agree with each other, and with other co-conspirators not named as defendants herein, to commit the following crimes. . . ."
>
> 1. Violations of Section 77 (q) (a) of Title 15, U.S.C.A., in the offer for sale and sale of common stock of Uinta National Insurance Company directly or indirectly . . . by means of untrue statements and omissions to state material facts . . . operate a fraud and deceit on purchasers of said stock by use of the United States mails as described in Count One through Eight, inclusive, of this indictment, and hereby included herein by reference."

This, then, is a "stock fraud" case. The Court of Appeals concluded (in 15 printed pages, Appendix A to this Petition) that the evidence was sufficient to support the verdict of the jury and affirmed the judgment.

The evidence relied upon by Petitioners to sustain a reversal is shown by the following:

a) Maxfield formed Uinta Finance on September 4, 1956 (Ex. 1). This company was publicly owned. In 1958, Maxfield, with other officers of Uinta Finance, incorporated Uinta National as a Legal Reserve Insurance Company under Utah law. It then received its solicitation permit to engage in the insurance business in Utah. About six months after the $125,000 was borrowed, Maxfield repaid this debt to Uinta Finance by delivering to it 242,000 units of Uinta Natonal stock at the public offering price of $1.00 per unit.

The sale by Maxfield of his Uinta National stock to Uinta Finance was an arms-length transaction. The transaction vested title to said 242,000 units in Uinta Finance (R. 291; Ex. M.B.).

The stockholders of Uinta Finance ratified the purchase of the Maxfield stock on February 13, 1959, at a special stockholders' meetng (Ex. M.E.). Subsequently, the officers of Uinta Finance, elected to sell a portion of its Uinta National stock holdings at a profit, to wit: $1.14 per unit to Western States. Accordingly, Uinta Finance entered into a agreement with Western States similar to a conditional sales contract, in implementation of which Uinta caused its stock to be placed in a bank safety deposit box. Western States was entitled to receive only the shares for which it had actually paid.

Western States undertook to sell this stock it had purchased from Uinta Finance and, in fact, did receive $182,000 cash. It did deliver $96,140 in fully paid stock

to its subscribers, but failed to deliver to its subscribers approximately $83,000 worth of stock for which it had received payment. Uinta Finance realized a profit of approximately $27,000 on its stock sold and paid for by Western States.

The record is amply clear that Maxfield was not a controlling person of Western States. Furthermore, it shows clearly that he did not sell stock for Western States, neither did he employ any salesmen, supply any information to the public, or receive any money from the sale of the subject stock. Neither did he have anything to do with the sales activities of Western States. When Maxfield finally learned of the financial situation of Western States he took affirmative steps to protect the Uinta companies by advising the Utah Securities Commission of the information he learned and requested that regulatory body take whatever action it deemed necessary under the circumstances.

b) Petitioner Christopher participated as a stock salesman in the Uinta Finance stock sale and continued his stock selling efforts in a directive capacity in the Uinta National stock sales programs.

Western States was incorporated by Christopher, his brother-in-law and wife. This company was an independent brokerage corporation caused to be licensed by Christopher who not only sold the Uinta National stock it had purchased from Uinta Finance, but also sold Uinta National stock purchased from others which it resold, and undertook to sell the securities of the following other corporations:

1. Continental Life Insurance Company
2. Ogden Smelting and Refining Company
3. FIF Mutual Funds
4. A Fire Alarm Program
5. Idaho Farm Cooperative (R. 967, 977)

In September, 1960, the SEC was investigating Western States relative to its non-delivery of stock paid for by its customers. In this connection it took the deposition of Christopher (Ex. 122).

This deposition was tantamount to a confession by Christopher and was tainted two-fold:

Firstly, Christopher was induced by promises of or benefits by so testifying in that he was told the SEC was not after him, "a small fish," but, in fact, was after Maxfield (R. 1166, 1173).

Secondly, the Christopher confession was purposely aimed at Maxfield and was highly prejudicial to him. It was clearly an attempt by Christopher to lay the blame of the cash shortage of Western States of approximately $83,000 on Maxfield. Christopher was trying to make Maxfield the scapegoat to save himself.

NO DEFINITION OF CONTROLLING PERSON GIVEN JURY

The first eight counts of the indictment charged Maxfield with being a controlling person in several corporations and particularly Western States. The record completely fails to show that Maxfield in any way was controlling person in Western States. The

jury should have received by way of proper instruction a definition of what is a controlling person in order to consider that point in determining whether or not Maxfield was guilty as charged in the first eight counts.

In this regard, the following instruction which Defendant Maxfield requested that the Court give to the jury but which proposed instruction was refused by the Court (R. 1807) or its equivalent should have been delivered to the jury:

> "You are instructed that while some evidence has been introduced and received pertaining to the alleged false representations and promises and pertaining to fraudulent concealment of material facts by agents of Western States Underwriters, Inc., you are not to consider this evidence against the defendant, Reed Maxfield, unless you are first satisfied beyond a reasonable doubt that said defendant, Reed Maxfield, possessed the power to direct or to cause the direction of the management policies of Western States Underwriters, Inc."

The first eight counts of the indictment charged Maxfield with crimes of which he could only be guilty if he was a "controlling person" of Western States Underwriters. The jury's finding of guilty on these counts is a finding that he was a controlling person. The finding does not square with the jury's finding that Maxfield was not guilty under Count Eleven. Obviously, since the record is totally devoid of any competent evidence that Maxfield was a controlling person of Western States his conviction under the first eight counts arises out of the confusion in the minds of the jurors of what a controlling person is.

Had the jury been given the instruction, they could have based their deliberation on a legally sound premise. In its absence, they were simply awash in a sea of confusion.

THE CONFESSION OF CHRISTOPHER WAS NOT ADMISSIBLE

The use of the Christopher deposition to convict involves fifth and sixth amendment questions.

The use of the deposition-confession as against Christopher was improper and prejudicial error for Christopher simply was not afforded his constitutional rights in connection with his giving his deposition.

The Christopher deposition is the only evidence in the record which relates Maxfield to Western States. The admission of the Christopher deposition undoubtedly created confusion in the minds of the jurors regarding the controlling person question above presented, but its use also faced the jury with the super-human task of ignoring it as to Maxfield.

REASONS FOR GRANTING THE WRIT SUMMARY

The Tenth Circuit Court of Appeals by affirming the jury verdict glosses over long established principles of criminal law which in the instant case should exonerate Petitioners. In the instant case, the Tenth Circuit holds that a jury verdict may be inconsistent with itself. This is contrary to decisions announced in the Third and

Eighth Circuits but is in accord with decisions of the Second, Sixth, Seventh, and Ninth Circuits. This Court should settle this conflict of decisions among the Circuits.

The Tenth Circuit Court in affirming the judgment of the Trial Court has decided that information obtained in a secret deposition affecting joint defendants is admissible as to the defendant *who gave the deposition-confession,* and is not prejudicial to the codefendant who was not present at the taking of the secret deposition and who had no right or opportunity to cross-examine the declarant of the deposition so long as the trial court instructs the jury to disregard the deposition-confession as to the codefendant.

The Tenth Circuit Court in affirming the judgment of the Trial Court rejected the contention that matters of jurisdictional nature could be raised at any time and states, while conceding that the misconstruction of Utah law was not an acceptable misrepresentation, that the objection thereto could not be raised in the first instant on appeal.

The Tenth Circuit Court in rejecting the consideration of the jurisdictionally fatal inclusion of charging the defendants with misconstruction of Utah law as to the basis of an alleged misrepresentation, has departed from the usual course of judicial proceedings and calls for an execution of this Court's power of judicial supervision.

The Tenth Circuit Court is deciding important questions of the Securities Act and evidenciary rules relating to the same in the following particulars:

a) That a definition of a controlling person as used in the Act is unnecessary in criminal prosecutions; and

b) That the financial condition of a brokerage company selling the stock of another company is a material fact which the selling brokerage company should disclose to purchasers buying securities of another company for which it is acting as an agent.

The basic, indisputable facts provide ample reasons for granting certiorari in this case.

REASONS

1. THE VERDICT IS CONTRARY TO THE EVIDENCE AND THE LAW AND IS FATALLY INCONSISTENT.

In Counts One through Eight the essential charging parts of the allegations are the employment of a device, scheme and artifice to defraud by means of untrue statements of material facts and omissions to state material facts. The device, scheme and artifice employed was allegedly the formation of Western States by Maxfield and Christopher for the purpose of selling Uinta National stock which was owned by Uinta Finance and which stock at one time had been owned by Maxfield. Further, that Maxfield was, in fact, a controlling person in Western States. Western States sold substantial amounts of this stock to many investors including those named in the various Counts in the indictment. Count Eleven of the indictment recharges Maxfield in one Count for everything he allegedly did in Counts One through Eight. The first eight counts

of the indictment as Judge Murrah pointed out are "inexcusably prolix and redundant counts." If Maxfield was not guilty of Count Eleven, he was necessarily not guilty of the other counts, and if he was guilty of Counts One through Eight, he necessarily, under the evidence, was guilty of Count Eleven.

The Circuit Courts are not in agreement as to whether or not an inconsistent verdict may stand. In *Bargesser v. State*, 95 Fla. 404; 116 So. 12, and in *Speiller v. U.S.*, (3rd Cir.) 31 F.2d 682, it was held that *an inconsistent verdict cannot stand.* The Third Circuit per Judge Davis said:

> "In the instant case, the verdict of guilty on the first count is not based on other evidence than that on which the jury found the defendant not guilty on the second count. The government relied upon the same facts to support a conviction in both counts. In the second count, the jury said, in substance, that these alleged facts are not true; they have no legal existence. Where there is an acquittal on one count of an indictment and a conviction on another count, charging the same crime, the verdict of conviction will not be allowed to stand unless supported by evidence other than on which the acquittal was based. *Peru v. United States*, 4 F.2d 881 (C.C.A. 8); *Murphy v. United States*, 18 F.2d 509 (C.C.A. 8); *Boyle v. United States*, 22 F.2d 547 (C.C.A. 8). We are aware that the Circuit Court of Appeals for the Second Circuit has taken a different view in the cases of *Steckler v. United States*, 7 F.2d 59, and *Seiden v. United States*, 16 F.2d 197. The Seventh and Sixth Circuit Courts of Appeals in the cases of *Carrignan v. United States*, 290 F. 189, and *Gozner v. United States*, 9 F.2d 803, agree with the Second Circuit, but

with great respect we are constrained to differ with them. When the liberty of a citizen is at stake, a jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time."

In *Thompson v. U.S.*, 227 F.2d 671 (9th Cir.), a similar question was raised. In that case, the jury found the defendant not guilty on a conspiracy count and guilty of making untrue statements and omissions to state material facts as charged in two other counts. The Appellate Court said contrary to the ruling in the Speiller and Bargesser cases, supra, that: "Verdicts on different counts need not be consistent." However, the court quickly went on to say, "Besides, there was no inconsistency shown."

In the instant case the defendant Maxfield, without engaging in any sale with the public; without employing any salesman; without receiving any money from any sale to the public; and without supplying any information to the public whatsoever, was found guilty of all the misdeeds chargeable to Christopher with whom he did not conspire. We submit this is not only inconsistent, it is manifestly unjust.

2. THE CHRISTOPHER DEPOSITION-CONFESSION WAS ERRONEOUSLY ADMITTED AS TO CHRISTOPHER FOR IT WAS INDUCED BY HOPE OR PROMISE OF REWARD OR OTHER BENEFITS AND WAS PREJUDICIAL IN THAT IT ALMOST WHOLLY REFERRED TO MAXFIELD THROUGHOUT ITS CONTENTS.

The use of a confession in a conspiracy criminal trial where one defendant's confession implicates another, has long been a subject of controversy as to whether or not it is unfair to a man who has not confessed. The instant case goes further, for not only did one codefendant not confess, he in fact, denied ever being implicated in the unlawful activities of the confessing defendant. The deposition-confession of Christopher was given with the view of hope, promise or reward if he could implicate Maxfield. But for the deposition-confession of Christopher, in this case, there would be no competent evidence for the jury to consider relative to Maxfield's alleged control of Western States.

As Justices Frankfurter, Black, Douglas and Brennan pointed out in their dissent in *Delli Paoli v. United States*, 77 S.Ct. 284, 351 U.S. 245 (1957):

> "Prosecutions for conspiracy present difficulties and temptations familiar to anyone with experience as a federal prosecutor. The difficulties derive from observance of the rules governing evidence admissible against some but not all defendants in a criminal case. The temptations derive from the advantages of prosecuting in one trial two or more persons collaborating in a criminal enterprise. One of the most recurring of the difficulties perttains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma is usually resolved by admitting such evidence against the declarants but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrisically ineffective in that the effect of such a nonadmis-

sible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing the rule of admitting the declaration solely against a declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:

'in effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.' *Nash v. United States,* 2 Cir., 54 F. 2d 1006, 1007.

It may well be that where such a declaration only glancingly, as it were, affects a codefendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to a coconspirator, the petitioner in this case, is no justification for causing such harm. The Government should not have the windfall of having the jury consider evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a

defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial.

It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best of reasons for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him. In any event, it is not for an appellate tribunal to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against petitioner."

In the very recent cases of Katzenbach v. Morgan, et al., Nos. 847, 877 and 673, October Term, 1965, this Court stated in part as follows:

". . . Any statement given freely and voluntarily without any compelling influences is, of course, admissable in evidence." The Court in that case further stated: ". . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court."

The compelling influence exerted upon Christopher is obvious. He was trying to blame Maxfield, whom he had been told was the person whom the government was after, for his difficulties. The statement made to Christopher at the time of the deposition by the attorney for the government advised him that he was required to answer all questions except those which would expressly incriminate him and did not effectively advise him of his right to remain silent when he was under investigation as required by the Morgan case (supra) and his right to know that in fact he was being investigated for criminal prosecution.

It is submitted, that even assuming the Christopher deposition-confession is admissible as to Christopher, since it inculpates Maxfield it is a denial of due process as to Maxfield to rely on a jury's presumed ability to disregard codefendant Christopher's confession which implicated Maxfield. A jury should not be permitted to be influenced by evidence against a defendant that as a matter of law they cannot consider but as a matter of fact they cannot disregard. See Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) pages 104-105, to the same effect and *Jackson v. Denno,* 84 S. Ct. 1774, 378 U.S. 368.

The California Supreme Court, in *People v. Aranda,* 407 P. 2d 265 (1965), pointed out that "a jury cannot segregate evidence into separate intellectual boxes. It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

3. THE COURT ERRED IN PERMITTING THE JURY TO CONSIDER EVIDENCE CONCERNING MISREPRESENTATION OF LAW IN DETERMINING GUILT OR INNOCENCE.

The eight counts of the indictment of which Defendants were found guilty each contain specifications of sixteen alleged misrepresentations and nineteen alleged concealments of material facts. In reading said allegations, the Court indicated, in effect, that he believed that even if proved many of the allegations of

misrepresentations and omissions of material facts alleged in the indictment would not be sufficient for a conviction. After reading sub-paragraphs (3) through (11) of the specifications in the indictment to the jury the Court made the following statement:

> "Again, I simply say by way of comment, it seems to me that other matters are more material to the claims of the Government. That, standing alone, wouldn't be sufficient, even if other elements of the offense were present, and the same may be said about general representations as to the solvency of the insurance company." (R. 1770.)

The Court then read sub-paragraph (12) of the specifications in the indictment to the jury and in so doing he inserted his own comments as follows:

> "(12) That the law of the State (impliedly, Utah) compels the company (impliedly, Uinta Insurance) to invest every dollar of its assets in United States Bonds or securities which the State considers just (as) safe." (R. 1770.)

After reading, commenting upon and emphasizing the above charges contained in sub-paragraph (12) of the indictment the court further emphasized the importance of sub-paragraph (12) to the Government's case by making the following statement:

> "And then the Government alleges other background matter, *which I don't deem as essential to their charges* but which may be considered to the extent supported by the evidence as going to other essential charges which I have mentioned." (R. 1771) (Emphasis added).

The Court then summarized and in effect told the jury that they would be authorized to find the Defendants guilty if they found that the Defendants had misrepresented Utah Law, as follows:

> "You can read the indictment and *consider the charges which I specifically referred to which I think are the ones, if any, which would authorize a finding of guilt,* if all of the other elements of the offense were present, in line with the comments that I would hereafter make." (R. 1771) (Emphasis added).

The Court further emphasized the offense charged in the indictment of misrepresentation of Utah Law (R. 1773) and permitted the jury to take a copy of the indictment containing that charge with them to the jury room and invited them to use it in their deliberations (R. 1771, 1776).

The Court in the above quoted citations (R. 1770, 1771) indicated, and the record clearly discloses, that all of the other material allegations contained in the indictment as to misrepresentations or omissions of material facts fell short of charging an offense and the proof were insufficient to prove said allegations beyond a reasonable doubt. Everyone agreed, and the record clearly discloses, that *the sales kit used by the stock salesmen contained precisely the misrepresentation specified in sub-paragraph (12) of the specifications in the indictment* (quoted above). **THE COURT, IN EFFECT, TOLD THE JURY THAT IF THEY FOUND THESE ADMITTED FACTS TO BE TRUE THAT THEY SHOULD FIND THE DEFENDANTS GUILTY.** Sub-paragraph

(12) was heavily emphasized by the prosecution in its evidence and its argument to the jury.

Both Defendants failed to object to the instructions of the Court to the jury with respect to misrepresentation of Utah Law. The Circuit Court of Appeals for the Tenth Circuit in its decision in this case (..... F.2d .....) acknowledged that a misrepresentation opinion of law cannot be the basis for fraudulent misrepresentations, however, refused to reverse the conviction because the Defendants failed to object to the instructions of the Court concerning misrepresentation of Utah Law and because they felt that other specifications of alleged misrepresentations or omissions of material facts were contained in the indictment which, if proven, would authorize the jury to find the Defendants guilty.

This argument begs the question. If a reasonable doubt exists as a matter of law as to whether the Defendants were convicted and are to be punished for acts which are not criminal the conviction should be reversed and they should be granted a new trial. In this case not only does a reasonable doubt exist as to whether the acts for which the Defendants were convicted are in fact criminal acts, but an extremely strong probability exists that the Defendants were convicted of misrepresenting Utah Law which is not a crime. All other charges contained in the indictment were vague and speculative and the proof adduced by the government was weak and unreliable. The only specific proof of an actual misrepresentation or omission was proof that the salesmen misrepresented Utah Law, a fact which everyone openly admitted.

If the only misrepresentation contained in the indictment had been the misrepresentation of Utah Law there would be no doubt that the conviction must be reversed. A Criminal Court acquires its jurisdiction of the subject matter of the offense from the law which defines the acts which the law declares to be criminal, and jurisdiction of the subject matter can neither be waived nor conferred by the consent of the accused. Objection that the court does not have jurisdiction of the subject matter may be made at any stage of the proceedings, and the right to make such objection is never waived. 21 Am.Jur. 2d Criminal Law 379; *U.S. v. Choate,* (C.A. 5) 276 F.2d 724, 86 A.L.R.2d 1337; *Harris v. State,* 46 Del. 111, 82 A.2d 387; *Stilwell v. Markham,* 135 Kan. 206, 10 P.2d 15; *State v. Slorah,* 118 Me. 203, 106 A. 768, 4 A.L.R. 1256; *State v. Venella,* 40 Mont. 326, 106 P. 364; *State v. Oliver,* 186 N.C. 329, 119 S.E. 370; *State ex rel. Lea v. Brown,* 166 Tenn. 669, 64 S.W.2d 841, 91 A.L.R. 1246, cert. den. 292 U.S. 638, 78 L. ed. 1491, 54 S.Ct. 717; *Kelley v. Meyers,* 124 or 322, 263 P. 903, 56 A.L.R. 661; *State v. Stephens,* 150 L.A. 944, 91 So. 349, 23 A.L.R. 286. A criminal court acts beyond its jurisdiction when it undertakes to imprison for an offense to which not criminality is attached. 21 Am.Jur. 2d Criminal Law 376; Re *Corryell,* 22 Cal. 178; *Ex parte Rickey,* 31 Nev. 82, 100 P. 134. The inescapable fact is that the Court had no jurisdiction to try or to punish the Defendants for a misrepresentation of law. To the extent that the conviction of the Defendants is based upon sub-paragraph (12) of the indictment (quoted above) and upon misrepresentation of Utah Law in the sale of the securities

as charged in the indictment the Court is wholly without jurisdiction over the subject matter of the offense, has no power to convict or to punish these Defendants and accordingly the conviction should be reversed and a new trial should be granted on the indictment after striking therefrom all negotiations which charge the Defendants with misrepresentations of law.

The fact that the indictment contains other allegations of alleged misrepresentations or alleged omissions of material facts does not cure the jurisdictional defect which exists as a matter of law in the trial court and accordingly the conviction and sentence should be declared void. If we must speculate as to what evidence was considered by the jury in convicting the Defendants (and this we must do if charges of misrepresentation of law are struck from the indictment), then as a matter of law there is a reasonable doubt as to the guilt of the Defendants and the verdict, conviction and punishment should be set aside by this court.

Due process of law requires that a person actually be guilty of some act or omission which the law declares to be criminal before he can be tried and convicted.

4. DEFINITIONS OF A "CONTROLLING PERSON" UNDER THE SECURITIES ACT SHOULD HAVE BEEN FURNISHED THE JURY BY PROPER INSTRUCTION.

Maxfield was charged with having controlled Western States and other corporations. In this regard, an instruction was imperative. The facts are indisputable that Maxfield sold Uinta National stock to Uinta Fi-

nance. In turn, Uinta Finance sold it to Western States who sold it to the public. At every stage of this transaction the subject persons and corporations made a profit. It was absolutely necessary to the Government's case to show that Maxfield be shown to control the subject corporations. There was no requirement or need for the Court to imply through its various instructions what was meant by "control." In fact, in *United States v. Re,* 336 F.2d 306 (1964), the Court defined control under the Securities Act. It said, "the meaning of control . . . is no different than it is in normal everyday usage." See *Lorain Journal Co. v. F.C.C.,* (C.A.D.C.) 351 F.2d 824 (1965), wherein the Circuit Court for the District of Columbia Circuit examined the unauthorized transfer of control of a broadcasting station. This Court in reviewing the facts found several indicia of control including:

1. Control of directors;
2. Control of the pursestrings;
3. Control of the company policies; and
4. Indirect management.

In the instant case, on this score, the record is naked of any facts which would place control of Western States in Maxfield's hands.

5. FINANCIAL CONDITION AND SOLVENCY OF WESTERN STATES WAS NOT A MATERIAL MATTER TO BE PRESENTED TO THE JURY.

Western States was the insolvent corporation, not Uinta National. It was Uinta Finance's stock that was being sold by Western States.

In this case the Petitioners by the jury verdict are charged with having misled the public on Western States' financial condition in order to sell the public Uinta National's stock. The financial condition of Western States was totally irrelevant. No complaint is made that the public was misled on Uinta National's financial condition, only on Western States. The insolvency of Western States does not constitute a public offense either by Christopher or Maxfield.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Dated this 23rd day of June, 1966.

RONALD C. BARKER
Attorney for Petitioner Christopher

ROBERT W. HUGHES
CLIFFORD L. ASHTON
Attorney for Petitioner Maxfield

(Appendices A, B, and C follow)

APPENDIX A

MARCH 1966 TERM

Nos.
8208
8209

REED R. MAXFIELD and
JOHN R. CHRISTOPHER,

Appellants,

vs.

UNITED STATES OF
AMERICA;

Appellee.

Appeal from the United States District Court for the District of Utah

---

RONALD C. BARKER
for Appellant John R. Christopher

CLIFFORD L. ASHTON
for Appellant Reed R. Maxfield
(Robert W. Hughes with them on briefs.)

DAVID K. WINDER
for Appellee
(William T. Thurman, United States Attorney, David B. Bliss and Seymour Glanzer with him on brief)

Before MURRAH, Chief Judge
BREITENSTEIN and SETH, Circuit Judges.
MURRAH, Chief Judge

Appellants Maxfield and Christopher separately appeal from a judgment and sentence pursuant to a jury verdict on eight inexcusably prolix and redundant counts of an indictment, each of which charges separate

violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77(q).[1] In identical language (except the specific charge of separate fraudulent sales to different individuals) they charge the defendants with having devised an unlawful scheme to sell the stock of Uinta National Life Insurance Company by means of untrue statements and omissions to state material facts. Each count charges the same sixteen specific misrepresentations and nineteen concealments of material facts.

In his instructions to the jury Judge Christensen epitomized the charges to the effect that during the period referred to in the indictment, Maxfield served as President, Chairman of the Board and controlling person of both Uinta Finance Company and Uinta National Life Insurance Company and he also organized, dominated and controlled Western States Underwriters and Mid-America Securities of Utah; that during the same period referred to in the indictment, Christopher served as sales manager and salesman and, together with Maxfield, dominated and controlled the business affairs of Uinta National, Mid-America and Western States; that upon the organization of Uinta National in May, 1958, Maxfield personally acquired, either directly or through others under his control, 10,000 shares of the 76,250 authorized shares of Uinta National at a cost of $14.775 per share in consideration of promotional services; that he and Christopher offered,

[1] Counts 9 and 10 of the indictment charged each of the defendants with a scheme, device or artifice to defraud by use of the mails in violation of 18 U.S.C. 1341. Count 11 charged that appellants conspired to violate the Securities Act and the Mail Fraud Statute in violation of 18 U.S.C. 371. Both defendants were acquitted on Counts 9, 10, and 11.

sold or caused to be offered and sold to investors through the Services of Uinta Finance and Western States all of the 10,000 shares at prices ranging from $40 to $70 per share.

With characteristic thoroughness and fairness, the trial court guided the jury through the complexity of the allegations in the indictment, explaining the meaning of both the applicable law and the charging language. The court interpreted the essential and basic elements of the Government's allegations as the offer and sale of the Uinta National Life Insurance Company stock through the Western States Underwriters by misrepresenting the identity of the parties beneficially interested in said stock, particularly Maxfield's interest therein, or concealing such interest; by representing the non-availability of the stock to the general public and its preferential availability to the stockholders by means of preferment or entitlement certificates; by misrepresenting the increasing value of the stock and its deliverability when paid for by the particular investor.

At the conclusion of the instructions, counsel for Christopher excepted only to the court's failure to give all requested instructions given as requested by the Government. We have said that his form of generalized objection is insufficient to distinctly state the matter objected to and the grounds for the objection as required by Rule 30, F.R.Crim.P., 18 U.S.C. See *Burns v. United States,* 286 F.2d 152. Counsel for Maxfield's only exception was that "inasmuch as the complaint charged that Maxfield was a controlling person in Western States, the court should have instructed the jury that it must so find."

Apparently without contending against the sufficiency of the evidence to go to the jury on the existence of a fraudulent scheme, Maxfield insists that the evidence is entirely insufficient as a matter of law to sustain the allegations in the indictment to the effect that he dominated and controlled the Western States Underwriters or that he had anything whatsoever to do with the sale of Uinta National stock as alleged in the indictment. Instead he points to his strenuous objection to Christopher's operation of Western States and to his protest to the Utah Securities Commissioner. In sum he contends that although he sold no stock, employed no salesmen, supplied no information to the public, and received no money from the sale of stock, he was nevertheless found guilty of all the misdeeds charged to Christopher, with whom he had been found not to have conspired. He says that acquittal on the mail fraud and conspiracy charges required acquittal on the other eight counts. But, as we have recently held following established authority, since each count in an indictment is a separate offense, consistency in the verdict is not necessary. See *Burns v. United States,* supra; *Thomas v. United States,* 227 F.2d 667.

The basic facts are that Maxfield, his brother and others organized and promoted Uinta Finance by a public offering of its stock within the state of Utah. Maxfield was President, Chairman of the Board and dominant officer. Christopher was Sales Manager during part of the stock offering. In May, 1958, Maxfield and at least some of the incorporators of Uinta Finance formed Uinta National Life Insurance Company with a $10,000 paid-in capital structure. The incorporators

apparently gave notes for their respective stock subscriptions, and Maxfield thereafter acquired the 9,600 shares of non-voting incorporators' stock. About five months later, he borrowed $125,000 from Uinta Finance to pay for the stock and qualify the insurance company in Utah as a legal reserve company. The insurance company public stock offering was completed in the latter part of 1958. The last block of stock was sold to a former stock salesman for Uinta Finance and Uinta National who in turn sold it to Mid-America Securities.

Early in 1959 Maxfield divided 6,050 shares of his incorporators' stock into 242,000 units and sold it to Uinta Finance for $242,000. His loan account with the insurance company was credited with this amount. It thus appears that the incorporators' stock which Maxfield purchased for the sum of $125,000 was resold to the finance company for $242,000.

Mid-America had been organized by appellant Maxfield's brother in 1955 and apparently thereafter sold to Norman Hays. In 1958 Maxfield negotiated the resale of the company to his brother for the sum of $2,500, paid by a Uinta Finance Company check. Christopher registered as a dealer for Mid-America and apparently became its Sales Manager. Early in 1959 Maxfield negotiated the resale of the company to Hays for $1,500 and arranged with Hays for Mid-America to sell some of the stock which he had sold to Uinta Finance by depositing the stock in a safety deposit box for delivery as and when sold. But, on advice of counsel Hays finally declined to participate in the sale of the stock. Maxfield objected to the competency of these transactions, but the evidence was apparently ad-

mitted to show Maxfield's continued interest in the sale of his insurance stock to the public and also as a nexus with the Western States activities. We think it was admissible for that purpose. See *Roe v. United States*, 316 F.2nd 617.

In the fall of 1958 Christopher had resigned as Sales Manager for Uinta National and early in 1959 with his wife and other he organized Western States Underwriters. It immediately entered into a contract with Uinta Finance for the sale of Uinta National stock which Maxfield had sold to the finance company. Thus, Christopher was Sales Manager for Uinta Finance when its stock was being offered directly to the public by the company. He was Sales Manager for Uinta National when its stock was being sold directly to the public. After the offering was completed, he became a registered salesman and Sales Manager for Mid-America. He then became Sales Manager for Western States. In all these stock offerings some of the same salesmen were used with the same sales kits which had been prepared by a sales promotion organization at the instance of Maxfield. Under an agreement with Uinta Finance, the insurance stock certificates were placed in a safety deposit box and were to be delivered to Western States as and when the stock was paid. Purchasers of the stock were permitted to pay for it either at the office of the finance company or Western States and to make their installment payments alternatively for stock purchased directly from the insurance company or through Western States.

There can be little doubt of the sufficiency of the evidence to go to the jury on the fraudulent scheme

to sell Uinta National stock through the facilities of Western States Underwriters. There was no disclosure of the circumstances surrounding Maxfield's acquisition of the stock and its sale to the finance company, and that the offering was a secondary issue. There was no demand for the stock justifying preferential representations to the stockholders. This sales gimmick was certainly susceptible of an inference of fraudulent misrepresentation in order to induce stockholders to buy more stock under the impression that the stock was in a seller's market. Then, too, there was proof to the effect that Western States did not deliver the stock upon payment. Of a total of $182,000 received by Western States for stock sales during the charging period only $96,140 of fully paid-up stock was ever issued to investors. $28,566 worth of stock was partially paid for by installments but not delivered, and $54,810 worth of stock was fully paid but not delivered.

The jury was instructed that "*** failure to deliver stock or the failure to refund money*** is not in and of itself charged as a criminal offense against either defendant, and such mere failure would not authorize a conviction in this case. On the other hand, if there were *** a plan to defraud, participated in knowingly and agreed to by one or more of the defendants and the use of the mails pursuant to such plan *** then the fact that thereafter money or stock either was not refunded or the fact that the buyers either did or did not sustain loss *** would be no defense to the *** defendants so participating in *** such scheme to defraud."

There was also evidence that during the time that Western States was in default on stocks sold and un-

delivered, Christopher and his wife drew over $30,000 from the company. The jury was specifically told that Christopher was not charged with the offense of withdrawing money from Western States or failure to deliver stock or refund money to persons who purchased stock from it, but these circumstances could be considered in determining his intent to devise a scheme to defraud as alleged in the indictment. There was evidence of fraudulent representations by salesmen concerning the value of the stock and the condition of the company, certainly enough to go to the jury on the issue of fraud and Christopher's complicity in it.

There was proof that Uinta National's Comptroller examined the Western States books and found a deficiency of about $15,000, and that it was reported to Maxfield; that Maxfield knew of Western States' deficiencies and defaults but took no action to protect the investors or prospective investors. Maxfield's persuasive answer is that in the first place he had nothing whatsoever to do with Western States' sales activities, was not interested in it and owed it no obligation. In the second place he says that when he finally learned of the financial situation, he complained to the Utah Insurance Commissioner and the Securities Commission; that his affirmative steps to protect the finance company and the insurance company from the stigma of Western States; defalcations should serve to exonerate him from any complicity in the enterprise. He says with emphasis that there was certainly no evidence to support the allegations in the indictment to the effect that he dominated and controlled Western States and that the jury should have been directed to return a verdict for him.

The trial court specifically instructed the jury concerning the evidence relative to Maxfield's acquisition of the Uinta National Stock sold through the facilities of Western States. The jury was told that the Government did not claim the acquisition of such stock by Maxfield in and of itself constituted criminal fraud and that the facts and circumstances surrounding the transaction and the sale of the stock to the finance company could be considered only with other facts and circumstances to determine whether in order to dispose of the stock Maxfield, himself or jointly with Christopher, devised a plan or scheme to sell such stock through Western States by means of false representations and caused the mails to be used in furtherance of such scheme.

With respect to Maxfield's alleged control of Western States the jury was specifically told that while it was not necessary for the government to show that in all respects and at all times Maxfield was and continued in control of Western States, it was essential to show beyond a reasonable doubt that Maxfield devised or agreed to a plan or scheme to utilize Western States to effectuate a fraudulent plant to dispose of the stock to the public and in furtherance of this plan Christopher or someone else acting in his behalf and within the scope of the plan utilized the United States mails as charged.

The jury was told that if Maxfield did not become a party to a plan or scheme to dispose of stock by false representations through Western States, any false representations used without his authorization by Christopher or those acting under him could not be attributable to Maxfield. On the other hand, if it is shown

beyond a reasonable doubt that Maxfield was a party to the alleged plan or scheme to dispose of the stock to the public by means of some or all of the material false representations charged, then the defendant could be held responsible for such false representation, if any, even though he had no actual knowledge of them at the time they were made.

Our examination of the record does not disclose that either of the appellants moved for a judgment of acquittal at the close of all of the evidence. In this posture of the case the sufficiency of the evidence to support the verdict of the jury is not open to us unless we are convinced from an appraisal of all of the evidence that the verdict is palpably wrong. See *Fitts v. United States,* 328 F.2d 844; *Hughes v. United States,* 320 F.2d 459. In any event we think the proof and the permissible inferences to be drawn from it was sufficient to go to the jury on the question of Maxfield's participation in the fraudulent scheme to sell Uinta National stock through Western States.

Maxfield also took exception to the cross-examination of him concerning his activities in connection with the merger of the insurance company with another company and the amount of money he made from the transaction. But, the records show that the door was opened on direct examination, and the scope of the cross-examination was for the trial court. There is nothing to indicate that the court's allowable discretion was abused. See *Wilcoxson v. United States,* 231 F.2d 384.

Christopher separately complains of the admission of the admission of his deposition taken by the SEC

and read to the jury over his objections. It was admitted as an incriminating statement against him, and the jury was cautioned that it was admissible as against him alone and not against Maxfield. It was voluntarily given while he was represented by counsel, and it is not rendered inadmissible simply because he thought it would serve to exonerate him of blame in the venture.

He also complains of answers by the court to a question of a juror. At the conclusion of all the evidence and instructions of the court, one juror inquired, "What do we do in case we don't agree unanimously? Do we continue to ballot?" The court answered, "Certainly, I see no likelihood or possibility at this stage of your not agreeing. It would be unusual if you don't agree. I've already instructed you with regard to the unanimity of your verdict. It would be most unfortunate if any juror at this time had made up his mind or had it in mind that they weren't going to agree, and I hope that that question doesn't reflect any such state of mind. But, nonetheless, I have given you an instruction on that." In the first place, no exceptions were taken to the court's answer, and in the second place, it was perfectly proper.

Prejudicial error is also claimed in the court's instructions relating to sub-paragraph 12 of the specifications of false representations. The indictment alleged in sub-paragraph 12 that Western States had represented to prospective investors that the law of Utah "compels insurance companies to invest every dollar of its assets in United States bonds or securities which the State considers just and safe." The court did read this representation to the jury along with eleven other

specifications and a number of specific acts of fraudulent concealment. In calling attention to these specific representations or fraudulent concealments, the court told the jury that there were other allegations of false representations and fraudulent concealment which it was perfectly free to consider, but pointed to the enumerated ones as, in its view, most material to the essential elements of the offense.

Christopher contends simply that a representation of the law of the State or Utah, or a statement of an opinion concerning it could not form a basis for a false representation. In the first place, no objection was taken to the court's instructions concerning this specific misrepresentation and concealment. If the representation was incapable of being fraudulent, counsel should have objected to it as such, either as being improperly alleged or improperly submitted to the jury. In the second place, the representation was not singled out for emphasis.

except in connection with the eleven other specific misrepresentations which the court deemed material. Conceding that an opinion on the law cannot be the basis for fraudulent misrepresentation, when considered in the context in which reference was made to it, we do not think it was palpably erroneous and it cannot, therefore, be noticed here for the first time on appeal.

Finally, both, Christopher and Maxfield, complain of the failure of the court to discharge the jury because of the illness of the wife of one of the jurors. The record in that respect, however, shows that the court proceeded with the full knowledge and consent of all the

parties. No objections were made at any point. It appears that while the jury was deliberating, information came to the court that the juror's wife was to have surgery. After discussing the matter in the chambers, and after having agreed upon a course of action, but before the court had time to inform the juror as agreed, the jury arrived at its verdict. There can be no complaint. No objections were ever made — as a matter of fact, no objections could have been made of the trial court's agreed treatment of the problem. *Cf. Bacino v. United States,* 316 F.2d 11.

The judgment is affirmed.

APPENDIX B

The Statutory provisions involved are 15 U.S.C. 77(q); which is as follows:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, either directly or indirectly —
>
> (1) to employ any device, scheme or artifice to defraud. . ."

18 U.S.C. 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

18 U.S.C. 1341:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for

the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94."

U.S. Const. amend. V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(Appendix C is contained in a separate booklet)

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CASE NO. 276

In the Supreme Court of the United States

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OCTOBER TERM, 1965

REED R. MAXFIELD and
JOHN R. CHRISTOPHER,
Petitioners,

vs.

UNITED STATES OF
AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

APPENDIX C

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah
Attorney for Petitioner John R. Christopher

ROBERT W. HUGHES
CLIFFORD L. ASHTON
707 Boston Building
Salt Lake City, Utah
Attorneys for Petitioner Reed R. Maxfield

APPENDIX C

(The "deposition-confession" of Petitioner Christopher) is as follows:

"Room 1119 Newhouse Building, Salt Lake City, Utah, Tuesday, September 27, 1960.

Met, pursuant to notice, at ten o'clock a.m., before G. Gail Weggeland, Esquire, on behalf of the Securities and Exchange Commission.

Appearances: G. Gail Weggeland, Esquire, 1119 Newhouse Building, Salt Lake City, Utah appearing on behalf of the Securities and Exchange Commission; Ronald Barker, Esquire, Salt Lake City, Utah by: Norman Wade, Esquire, Salt Lake City, Utah, appearing on behalf of the witness John R. Christopher.

Proceedings:

MR. WEGGELAND: Let the record show that this is a hearing to take testimony convening at ten o'clock a.m. at 1119 Newhouse Building, Salt Lake City, Utah. Present pursuant to a subpoena is John Ray Christopher, who is accompanied by his attorney, Norman Wade.

MR. WADE: I would prefer to have the record show Norman Wade, appearing at the request of Ronald Barker, who represents Mr. Christopher.

MR. WEGGELAND: Mr. Barker is Mr. Christopher's attorney?

MR. WADE: Yes, Sir.

MR. WEGGELAND: Also present and appearing for the Trade and Exchange Division is G. Gail Weggeland, attorney of the Salt Lake City Branch Office.

Mr. Christopher, I want to inform you that we intend today at this hearing to question you concerning the activities of Western States Underwriters, Inc., Home Investment Company, Mid-America Securities Company, and their relationship to you and to other corporations and individuals.

You have the constitutional and the personal right, if you choose to exercise it, to refuse to answer such questions as you deem might incriminate or degrade you. You are welcome to consult with your attorney on any questions which may be propounded, before you answer.

Now, I assume that we can get under way here; is that correct?

MR. WADE: Yes.

MR. WEGGELAND: Will you state your name?

MR. CHRISTOPHER: John Ray Christopher.

MR. WEGGELAND: What is your age?

MR. CHRISTOPHER: Fifty.

MR. WEGGELAND: And your residence?

MR. CHRISTOPHER: 4290 Wander Lane, Salt Lake City.

MR. WEGGELAND: We will proceed now to swear you, if you will stand up.

Whereupon JOHN RAY CHRISTOPHER was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEGGELAND:

Question: What is your business, Mr. Christopher? What activities are you engaged in?

Answer: At the present time?

Question: At the present time.

Answer: As a doctor, along natural lines, as a naturopath.

Question: As a medical practitioner?

Answer: No, I'm not an orthodox M.D. I am an M.H., ireodology, zone theraphy, and herbalist.

Question: Have you previously been involved in the sale of securities?

Answer: Yes, I have.

Question: What is your wife's name?

Answer: Wendella.

Question: Does she reside with you?

Answer: She resides with me at 4290 Wander Lane.

Question: Mr. Christopher, when did you first begin the sale of stock of Uinta National Insurance Company?

Answer: At the very beginning of their company. I am not sure as to whether it was in '57 or '58. It seems to me it was in '58, but I am not positive, but it is when the Uinta Finance Company started.

Question: You were engaged--you participated in the original offer of the shares of Uinta National Insurance Company, did you?

Answer: And Uinta Finance. We started out with Uinta Finance Company, and then we sold that out and went to the Uinta Finance of Arizona, and then to Uinta National Insurance.

Question: When you were selling the stock of Uinta National Insurance Company, were you employed--

Your Honor, these past tenses I added onto it.

--you were employed by the insurance company or by the finance company?

Answer: They are so closely related that I honestly don't know. I was working directly under Reed Maxfield, who is president of both companies. I know a number of checks came from Uinta Finance and a part of them from Uinta National. I don't

know which. You will have to pardon me. I am not being evasive about when I was paid by them, but I was hurt in an accident, and for the following year I had to have my name pinned inside of my coat and my phone number, and everything I did after that had to be written down. I haven't got all of my memory back yet, and there are things I cannot remember. When Guy comes in and Cliff, they can remember things I cannot even recall.

Question: As I understand, there were two offerings of Uinta National Insurance Company; one was the early incorporation or pre-incorporation offer, and one was a first offering as an organized insurance company; is that correct?

Answer: That I don't know. I know they had sold a little bit of stock before I came in, and they had two part-time salesmen at that time. But, I know that the board of directors and some other people did sell some stock. Now, whether that was pre-organization stock or part of the original, I don't know. I know there was on big block, and then another of Home Investment, or whatever it was. There was another amount, as I remember, and the last one.

Question: Well, now, in about January, 1959, an offering of Uinta National Insurance Company stock, which was being conducted by the insurance

company itself; is that correct?

Answer: That is, of its stock?

Question: Yes.

Answer: Yes.

Question: And who was in charge of that offering.? Who was supervising the sale of that stock?

Answer: I was sales manager.

Question: Of the stock?

Answer: Of the stock yes.

Question: And who were you working with in supervising the sales?

Answer: Reed Maxfield was the man that was telling me what to do and gave me instructions. All I did was take care of the men. I had a crew of men. I was the pusher, or whatever you want to call it.

Question: And thereafter some stock was sold by a company called Mid-America Securities Company; is that correct?

Answer: Yes.

Question: What was the purpose of changing the underwriting of it from Uinta Insurance Company to Mid-America Securities Company?

Answer: That was never called to my mind, Mr. Weggeland. By the way, I happened to find this in some of my papers.

(Witness produces letter and envelope.)

Question: I will take a look at this in a minute.

Answer: All right. That is in reference to Mid-America.

Question: Were you an officer of Mid-America Securities Company?

Answer: No, I wasn't.

Question: Did you ever agree to buy Mid-America Securities Company?

Answer: No, I didn't.

Question: Did you ever have any dealings with Norman Hays?

Answer: Just to talk to him.

Question: Concerning the purchase of stock of Mid-America?

Answer: We had some conversation. He was buying some stock, I was told, and I was buying some in Western States Underwriters.

Question: Were you informed that Mid-America Securities Company was a registered broker dealer under the Securities Act of 1934.

Answer: Yes.

Question: At any rate, did you occupy a position of direction or a position of authority in Mid-America Securities Company?

Answer: I was sales manager for them.

Question: And who was in charge of it at

that time?

Answer: I took my orders from Reed Maxfield, but his brother--

MR. BARKER: Your Honor, correction. That was Reed Maxwell for the record.

MR. WINDER: This is one of the reasons he has corrected after reading his notes?

THE WITNESS: That is correct. May I explain, your Honor? There are three places in this record where I've written "Reed Maxwell" instead of Reed Maxfield, and this is one of them.

THE COURT: Now, what is it supposed to be, according to your notes?

THE WITNESS: Maxfield.

THE COURT: All right.

THE WITNESS: I repeat the question, then--or, the answer:

I took my orders from Reed Maxfield, but his brother--was it Leland? No, it wasn't Leland. Well, he had a brother, as I understand, who was president or something of it. Now, as I say, Cliff and Guy can tell you this better than I could. I know this brother had something to do with Mid-America, but is was Reed Maxfield that told us what to do and when to do it. His brother had an

office--

Question: Did you tell them that you would see that an amendment was filed to the broker dealer form of Mid-America Securities Company?

Answer: No, I had nothing to do with that at all.

Question: Why did Mid-America Securities Company have to stop selling the stock of the Uinta National Insurance Company?

Answer: Reed Maxfield told me that because his brother was in there, there may be a question, and he wanted me to set up an individual company of my own. That was as much as I understood about it.

Question: What stock was sold by Mid-America Securities Company?

Answer: I don't know that. It was a primary issue, I know. It wasn't secondary stock.

Question: It was a first offering of the insurance company?

Answer: Yes.

Question: And it wasn't sold for any individual other than the company?

Answer: I think that receipt there--I am sure that was a primary stock.

MR. WEGGELAND: Let the record show that Mr. Christopher refers to an envelope and

an order form and a letter.

MR. WADE: May I see that when you're through?

MR. WEGGELAND: Which you will attach to the transcript as Commission's Exhibits Nos. 1, 2, and 3.

(Commission's Exhibits Nos. 1, 2, and 3 were marked for identification and received in evidence.)

Thereafter, Mr. Christopher, what participation did Home Investment have in the sale of the stock of the--

Answer: Home Investment came in, and I think they were to pay Mid-America--I'm not right sure on that, but I found a copy of an agreement, the first agreement that was made, in April of 1959. No, I thought this was it. But, anyway, the agreement had something in it about we had to pay so much a share to Home Investment. I was thinking that that was the one.

Question: Were you an officer of Home Investment Company?

Answer: No, I was not.

Question: Who were the officers of that company?

Answer: I don't know. It seems to me--

Question: Whom did you work for?

Answer: Reed Maxfield.

Question: Reed Maxfield was the person in charge?

Answer: Yes, Home Investment furnished us all of our printing, all of our mailing, which averaged a thousand or something a day. Stuff that went out to prospective buyers, and he furnished all of that, and I worked for him straight through.

Question: You weren't an officer of Home Investment Company?

Answer: No, I was not. I didn't have anything to do with it.

Question: Was your brother-in-law, Guy Walker, an officer?

Answer: No.

Question: The only person you had dealings with, then, was Reed Maxfield?

Answer: That is right.

Question: Did you participate in any negotiations between Home Investment Company and Uinta Finance Company or Uinta National Insurance Company relative to the obtaining of stock or the purchase of stock of Home Investment Company for resale?

Answer: No, I had nothing to do with that at all.

Question: Where did this stock come from

that Home Investment Company sold?

Answer: I don't know that.

Question: Did you ever ask?

Answer: I asked him, and he said it was secondary stock. I said: 'Where did the stock come from? Is it stock that has been turned back, or what?' And he said he had worked out - he said, 'Some of my personal friends'--I think he said some of his personal friends and some extra stock that they had sold in a lump. As I remember, that is the way he got it.

Question: In each of these participations in the sale of Uinta National Insurance Company stock, you were directed by Reed Maxfield?

Answer: That is right.

Question: And no other person?

Answer: Yes, sir, he is it. He is the one that says yes or no.

Question: In each of these you occupied the position of--

Answer: Sales manager.

Question: Sales manager?

Answer: Yes.

Question: Did you also supervise or keep track of the books and records?

Answer: No.

Question: Did you have supervisory rights over

the record keeping?

Answer: Up to a point, for the salesmen, for the amount of stock we sold, how much commission was paid to the salesmen, how much was paid in bonuses--that I took care of, yes. But all the rest of it went through the company.

Question: How, we're going to refer to the organization known as Western States Underwriters, Inc., how did that company come to be organized?

Answer: Reed Maxfield said he had this secondary stock, and he called me, and he said, 'I appreciate what you have done in the past,' and he said, 'I would like for you to have your own company now.' And he said, 'You can work this thing out through your own company.' I ran on to this notation. It doesn't make very good sense, but this was what I jotted down in his office. The amount we were to be allowed was 11 per cent option stock and that has got some other items there.

Question: This is a note that you took while you were being interviewed and were discussing this matter with Reed Maxfield?

Answer: That is right.

MR. WEGGELAND: Let the record show that this is written on the Mid-America Securities, Inc., of Utah stationery.

Answer: I notice the notation--

MR. WEGGELAND: It will be included with the transcript as Commission's Exhibit No. 4.

Answer: I notice that Home Insurance came in there. The stock was owned by Home Insurance--or Home Investment.

Question: Did you proceed to organize the company?

Answer: Yes, I did.

THE COURT: Pardon me. Now, is Exhibit 123 the exhibit referred to?

MR. WINDER: Yes, your Honor.

THE COURT: Well, Exhibit 123--

MR. WINDER: The Government will offer that.

THE COURT: It has been offered and received, within the limitations I've indicated; but I think the record should be clear, since there is reference to other things, that this is the only exhibit from the deposition or from the statement that is received.

MR. WINDER: Yes, Your Honor.

THE COURT: All right.

THE WITNESS: Question: And what office did you hold in that company?

Answer: I was going to be president and general manager; but because of an old, long-standing bankruptcy, I was not allowed to be my own broker. I told Reed I guessed I could not set up the company because I could not be a broker. And he said: 'Well, why don't you get your brother-in-law or somebody else to be broker for you?' So I asked my brother-in-law, Guy Walker, if he would be willing to undertake the broker's license, and he said yes. So he went in as the broker, and I still went in as general manager.

Question: You still had the preferred control over the company, is that correct?

Answer: That is right, yes.

Question: Now, in this company did you have supervisory power over the books and records and all facets of the company, or did you just direct the sales?

Answer: I directed sales. Well, I just said to Guy and Cliff, 'You take care of the records, because details irritate me.'

Question: Who was Cliff?

Answer: Cliff Pierce. He is a big fellow. I think he has been in here. He is a large fellow. He wrote my lessons for the men every week. Every week I had a lesson for them on

selling, and he did all of that work for me.

Question: Now, in your application to the State Securities Commission did you indicate Guy Walker as the president of the company?

Answer: Yes, that is right.

Question: And yourself as what?

Answer: As director.

Question: Not as an officer?

Answer: Just director and sales manager.

Question: As a matter of fact, you were the controlling person in that organization?

Answer: Yes, I was.

Question: Now, in the original application to the State Securities Commission, you indicated only $6,000 worth of capital; and $5,000 worth of this consisted of stock in the Uinta National Insurance Company?

Answer: There was $10,000, I think.

Question: In the original application, we are talking about.

Answer: O.K.

Question: Was that your personally held stock, or whose stock was that?

Answer: I don't remember. Now, I honestly don't remember that. I thought I'd just put in our office equipment and stuff like that, with the first one.

Question: Well, on the second one you included $10,000 worth of stock in the Uinta National Insurance Company?

Answer: Yes.

Question: Whose stock was that?

Answer: Well, it was Reed Maxfield's stock.

Question: Was it put in your name for any convenient purpose?

Answer: Yes, it was put in my name so that with our assets amounting to $10,000, we could open the company, because I had nothing tangible of my own that I would have open it with.

Question: Was this a gift to you by Mr. Maxfield?

Answer: It was understood that anytime he would ask for it back he should get it back.

Question: Has he asked for it back?

Answer: Well, the first one that was there, he asked for it back, and he put another one in its place. I remember that.

Then there's a question and answer deleted.

THE COURT: All right.

THE WITNESS: There wasn't $10,000 worth of assets?

Answer: For Western States?

Question: For Western States.

Answer: No, there wasn't.

Question: Did you participate in the sham to get your money--to get your company going?

Answer: He told me, he said: 'You can pay for this when you get your underwriting going, if you wish.'

Question: Was this stock put in a safety deposit box?

Answer: Yes.

Question: And it was unavailable to Western States Underwriters?

Answer: Unless I had Mr. Peterson, Leland Peterson, one of the directors of Uinta National Insurance Company hold the other key.

Question: Was he acting for Uinta Finance Company or for Uinta Insurance Company now?

Answer: I don't know. I honestly don't know. He held it like me, acting for Reed Maxfield, because the whole thing was one big program.

MR. WEGGELAND: Let's go off the record for a second.

And there was a discussion off the record.

THE WITNESS: MR. WEGGELAND: Back on the record. Now, where did Western States Underwriters propose to get this stock to sell?

Answer: I don't know. I asked him where it came from, and he said it was coming from secretary (sic) stock. I said: 'Where did it come from? Was it picked up from buyers, or what?' And he said no, that it was stock secured in an isolated one transaction. But I think it was Uinta Finance and Uinta Finance sold it to Home Investment. I said: 'Now, does that fulfill the law,' and he said, 'Yes, that is all it takes.' And he said, 'We will sell it to you.' Wait a minute. I am not sure now of that Home Investment. It was in there some place.

Question: At any rate, this was stock that was originally owned by Uinta Finance Company?

Answer: Uinta Finance, yes.

Question: Mr. Maxfield is president of Uinta Finance Company?

Answer: That is right.

Question: And he is also president of the insurance company?

Answer: Yes.

Question: Did he say this stock was part of any public offering, or was this part of another transaction, or a public offering?

Answer: He told me that it was various

stocks that he had accumulated, that he was getting rid of it--and it wasn't too clear.

Question: Now, I have a contract of purchase or agreement--it is entitled, "Contract of Purchase," and it states it was entered into on the 6th day of March between Uinta Finance Company and Western States Underwriters, Inc. Will you examine that and see if that is familiar to you?

Answer: Yes.

Question: And that was an agreement?

Answer: Yes, there were a number of agreements made up, one after another.

Question: This calls for the sale of 30,000 units for a consideration of $3,810. Where those 30,000 units of Uinta National Insurance Company stocks sold?

Answer: Yes, they must have been, because we have paid them, I think, in the neighborhood of $80,000 or something like that.

MR. WEGGELAND: We will incorporate this in the record as Exhibit No. 5.

Commission Exhibit No. 5 was marked for identification and received in evidence.

Question: Mr. Christopher, you provided another agreement entitled, 'Contract of Purchase,' which bears date of 3rd of April, 1959. From

this it appears that Uinta owns 107,687 units, or 2,692 and 7/40 shares of Uinta National Insurance Company stock, and the agreement involves $114,750 to be paid by Western States Underwriters, Inc. Was this agreement entered into?

Answer: As near as I know, it was. I don't know if it was just a copy of some of those other agreements there or not. It was made up.

MR. WEGGELAND: Do you want to look at this exhibit, Norman?

MR. WADE: Thank you.

MR. WEGGELAND: We will refer to that as Exhibit No. 6 and incorporate it with the transcript.

Commission Exhibit No. 6 was marked for identification and received in evidence.

MR. WEGGELAND: This document is entitled 'Option,' and it bears no date. But it is signed by Reed Maxfield, and it appears to grant or warrant the right to purchase 19,960 units of Class A and 40 units of Class B stock of Uinta National Insurance Company, or appears to be. Is that document familiar to you?

Answer: Yes. I don't know where it fits

in, though.

Question: Was that stock sold?

Answer: I imagine it was.

THE COURT: Now, Mr. James, I think we'll take a fifteen minute recess. Thank you.

(Recess.)

THE COURT: Please proceed, Mr. James.

MR. WEGGELAND: Call that Exhibit No. 7.

Commission Exhibit No. 7 was marked for identification and received in evidence.

MR. WEGGELAND: This is a document entitled 'Agreement' and it appears to be dated the 6th day of March, 1959. Is this document familiar to you?

Answer: Yes, that is the one I was thinking about.

MR. WADE: Is this the same date as another agreement we have already put in?

MR. WEGGELAND: No.

MR. WADE: I thought about the 6th of March, 1959, there was one that we showed you? No, that was April.

MR. WEGGELAND: Do you want to check them through?

MR. WADE: Yes.

MR. WEGGELAND: Question: That appears to be an agreement whereby Western States Underwriters will pay $5.40, I believe, to the Home Investment Company. What was the consideration that Home Investment Company was to return to Western States Underwriters, Inc., for that?

Answer: Well, that was--

Question: Excuse me. Correct that. It was $5.40 a share sold, for each share sold by Western States.

Answer: He gave me an explanation of that, Mr. Weggeland, that I cannot for the soul of me remember. It seems I asked why, and what that was for, and he said it could be run through a company, and we would consider that as a service for information and knowledge--underwriters background and so forth, you know--to help Western States in the brokerage end of it. As I remember--

Question: Who was to receive this money?

Answer: Well, the Home Investment, I think. That was Reed's brother again. Oh, I am not sure. It was either his brother or his sister.

Question: Was this money paid on the sale

of the stock?

Answer: I don't know whether a check was made out or not. I don't know that.

Question: Was this in the nature of a kick-back to Reed Maxfield and his brother?

Answer: That was my understanding.

MR. WADE: Excuse me, Gail. We find that Exhibits 5-A and 5-B have the same date, and both of them refer to 30,000 units. I am wondering if those are the same stock or different stocks?

MR. WEGGELAND: Yes.

MR. WADE: They are the same.

MR. WEGGELAND: Did Reed Maxfield own any stock or any participation in Western States Underwriters, Inc.?

Answer: No.

Question: Did he retain any control, management, or direction of the affairs of Western States Underwriters?

Answer: It wasn't supposed that he had; it was supposed to have been my company, and I operated it the way I did. But the first thing I knew, as soon as we started selling stock, every morning he would call me and want a report as to how many shares were sold and how much money

was paid down on it, and the salesmen who had sold it. And then it wasn't moving fast enough. I had, oh, just a small crew of maybe 15 or 20 men, and we needed to make it move faster, because I could see it wasn't moving out rapidly enough to even come close to making any money for me. And I ran an ad, and I never asked him if I could, because I thought it was my own company. I ran an ad in the Tribune trying to get men. And he saw it, and he called up and told me to cut it out. He said, "I want that shut off, because I might be involved,' because in the ad I mentioned something about selling insurance stock, and he said, 'That might cause me some trouble.' And he said, 'Don't put out any more ads.'

Question: Did you withdraw that ad then?

Answer: I withdrew it, yes. I had to kind of doubt what he said, for the simple reason that he had said I was overdrawn over $15,000 on Uinta Finance Company of Arizona, which I had gone down there and opened up, and on Nevada Broadcasting Fund, or something, or Nevada Broadcasting Enterprises.

Question: Were you indebted to Mr. Maxfield?

Answer: He said I was. I said: 'How

could I be indebted? Because just before I opened up Western States you said I was getting by fine, and you said you wanted to bank some of my money for me.' And I said, 'No, I want to bank my own money.' And then all of a sudden he comes up with a bill of $15,000.

Question: Therefore, he had quite a bit of leverage over your activity; is that right?

Answer: Yes. Because he said he would--it would be a little uncomfortable if I didn't follow through.

Question: Did he ever speak to you or discuss with you this plan of organizing the Western States as a system to evade the effect of the Securities Act in the sale of stock?

Answer: No, he never told me that. I asked at the beginning if everything was as it should be, and he said: 'Well, our attorney has drawn it up,' and he said: 'He would not draw up anything if it wasn't.' This was--I think it was Bob Hughes, or this fellow over on Fourth in the building on Cactus Street,--one of the two, I think it was Bob Hughes. And he had drawn up the Western States papers, and he said it would be all right.

Question: In the operation of Western States Underwriters, did Mr. Maxfield or any other per-

son ever actively interfere with the management of that company?

Answer: Well, he did in that case of making me supply the sales information and demanding daily reports from me.

Question: Did he ever make any threats upon you when you intended to refer some of the activities of that company to the Securities and Exchange Commission?

Answer: Well, at the time we were running behind and had used funds there for salaries and for rent; and I was trying to get other underwritings, because he had not followed through on the promise he had made that he would have other underwritings immediately that would cover this loss. So I went to him and said: 'I am in close to $10,000, and I would like to give you a note for it and give you any collateral I have got.' And he said: 'No, I could not take that. I would not take a note from you. I want you to meet this thing.' And I said: 'Well, I will just go in farther and farther.'

And then at another time Paul Kenner, who is an accountant, he said: 'I would like to buy Western States Underwriters from you.' He said: 'I will go out on the open market and buy

up the stock, and I will see that everybody you have sold stock to will be paid, will be given the stock,' and he said: 'I will make myself a nice piece of money out of this. He said: 'How much do you want?' And he named some very nice figures. And I said: 'All I want is to get out from under this thing and get it off my shoulders. I said, 'You can have Western States Underwriters.' And this is what I ran into Saturday (producing document) but right at the last minute under pressure he backed out. So I told Reed Maxfield--I think seven or eight times we had come to agreement where we were going to get securities or something that would take care of this stock, and each time would take care of this stock, and each time it would be a cat and mouse deal--an attorney is drawing up the papers--and then he would not sign them. And then he told me, he said: 'I'm going to have the state come down and check your records.' I said, 'All right, go ahead.' So Mr. Hardy called, and he said: 'We understand you have got an overdraft down there and they are going to check the records.'

So before they came down I called Reed, and I said: 'Well, look, if we're going to do it this way, I have tried to get out of this, I have tried

to make an arrangement to get out of this, and I'm going to the SEC.' And he said: 'Now just a minute. Don't get rash on this thing. I can take care of it all. They won't come down and investigate. Let's talk this over.' Well, there was no investigation by the state after that.

So he told me he was going to make an agreement, and he said, 'How much do you think you owe?' And I said: 'The most I could owe you, instead of $15,000, would be the $4,000 that you advanced on the dud I went on to Nevada.'

Question: When is the date this conversation took place?

Answer: I don't know.

Question: Was the date, say, September?

Answer: It was during the fall. That I know.

Question: August or September of 1959?

Answer: In 1959. I said: 'You advanced me $1,000 a week while I was in Nevada, but that all went out on expenses.' And I said, 'That was a rotten deal down there.' And he [redacted] 'If you will sign a note, let's just say [redacted],000--I say $4,000 and you say $15,000--if

you'll sign a note--' He would not let me sign a note before and take it over. He said: 'I will see if I can make some kind of arrangement for this stock.' So I personally signed a note without any collateral or anything, and then he would not go through with his agreement. Now he holds a note on me upon demand for $9,000. It is just his word that he won't press it until next spring.

Question: In the operation of Western States, how did your customers get stock issued to them?

Answer: Do you mean after they had paid in full?

Question: After they had paid their money in full.

Answer: It was mailed to them.

Question: How did Western States go about getting the stock to mail to them?

Answer: We would take a check down to Uinta National--we took it down to Reed Maxfield--I don't know which one--Guy and Cliff can clear that up--but we took a check down to him with the names of the people who had bought stock and paid for it in full and the number of shares or units that each of them had paid for; and then a stock certificate was made to each of them and sent back up and was mailed out.

Question: Those are made under the direction of the insurance company; is that right? Or how was that arranged between the finance company and the insurance company?

Answer: I don't know. I honestly don't know. Guy and Cliff took care of all that. They could tell you.

Question: Who kept track of the amount of shares that were sold?

Answer: Cliff did.

Question: Mr. Pierce?

Answer: Mr. Pierce, yes.

Question: Did the insurance company or the finance company keep track of the amount of stock sold?

Answer: We had to send them a report every day of the amount of stock sold, yes.

Question: What certificates was the stock transferred from?

Answer: I don't know.

Question: Was that the certificate of 100,000 referred to in the agreement attached hereto as an exhibit?

Answer: I don't know, because we had changed that several times. There was, as I remember, a smaller block of stock, and that

was taken out, and another put in, it seems to me two or three times. This is the last one that was put in, and I don't know whether it was drawn on or how it was worked. I don't know that.

Question: Did you have to pay for the stock before you could have it issued to your customers?

Answer: Yes.

Question: In every instance?

Answer: Yes.

Question: How, then, did you become overdrawn in your account?

Answer: Because the amount of commission which we wrote out, I had told him before we could not make a go of it, it was very small. You understand, when you have a crew of men of any size at all, on the stock rate as the primary underwriter you have to go to have a million shares to make it pay. Well, this was a very, very small issue. There wasn't enough commission to pay the expenses. And so out of the actual commission that we had, it would not even touch the operating costs. So we had to use the funds that were there, knowing that there would be other underwritings following. But when they didn't come, I tried a burglar alarm system to put the men on, and it flopped. And the same with Ogden Smelting and

Refining Company. Everything I put my hand to turned backwards on me.

Question: I believe you said you paid for each share of stock that was issued by the insurance company?

Answer: Oh, yes.

Question: By the insurance company?

Answer: Yes.

Question: You paid the money to the finance company?

Answer: That is right.

Question: How was that payment made?

Answer: On our Western States Underwriters check.

Question: How was the price determined in the sale of this stock?

Answer: Reed Maxfield determined it.

Question: He decided it at $1.35 a share?

Answer: That is right. We originally started at $1.75. Some of the first went at $1.75.

Question: Some stock sold at $1.75?

Answer: Yes. And then he figured it was a little bit too high.

Question: Was this offering registered with the Utah State Securities Commission?

Answer: He said it wouldn't have to be, be-

cause it was secondary stock.

Question: Were those people who paid $1.75 informed that stock was also being sold at $1.35 to people at the same time?

Answer: Well, I think, as I remember, they were given additional stock to make the difference between $1.35 and $1.75. There was some additional stock given. At least, that is what I had instructed for it to be done. As I remember, that is the way it operated, because I told them we would run into trouble.

Question: What was the commission received by the underwriter for the sale of the stock?

Answer: I am not sure, but I think it was 13 per cent. I think it was.

Question: And how much commission was paid to the salesmen?

Answer: As near as I can remember it was 10 per cent, and if they stayed through to the finish of the underwriting an additional one per cent. Now, I think that was it. I don't say I am right, but I think I am.

Question: Were salesmen given stock options?

Answer: Yes, they were supposed to. I don't think any of them have received it.

Question: Who promised them the stock option?

Answer: Reed Maxfield. In fact, he has promised me verbally because of the sale of stock for Uinta Finance and Uinta National Insurance that he would give me an option on 50,000 shares of Uinta National Insurance stock with three years to pay for it. But I have never had it.

Question: How did Mr. Maxfield explain the reason for pricing the stock at 35 cents more and in some cases 75 cents more than the recently completed public offering, which was made at $1?

Answer: Well, he said that because credit life, which they were selling at the time, was moving rapidly and they had a lot of insurance sales, that they figured the stock was worth more at that time.

Question: How many dollars of life insurance did he tell you or did he tell the insurance salesmen had been issued by the Uinta National Company?

Answer: Honestly, I would not try to say. It was a big amount.

Question: Did he ever say that over $3 million of life insurance was in force?

Answer: Yes.

Question: Although the company had been

in operation for something less than a year?

Answer: Yes. He said it was phenomenal. I remember he said it was outstanding, better than any other company in the state.

Question: Was this later determined to be false, this information?

Answer: I don't know. I don't know.

Question: Was this information conveyed to the salesmen personally by Mr. Maxfield, or did you tell them that?

Answer: I don't know. Now, honestly, I can remember something about it. It could have been that I related it to them, second from him. Now, I don't know. I would not say.

Question: Did you use some sales kits? Did the salesmen use the same sales kits that they had used in the public offering of Uinta National?

Answer: No. We used no kits at all.

Question: Did they use a prospectus?

Answer: No, they didn't use a prospectus. They weren't allowed to use that, I remember.

Question: What sales literature was used?

Answer: Let's see. There was--Uinta sent out letters.

Question: Uinta what? Finance company or insurance company?

Answer: I don't know. The thing is, they had

their own printing press down there, and they printed everything. And on their mailing they had their own mailing machines, stamping machines, and everything. They took care of all of it. Reed Maxfield. And we let it go that way. I don't know if the Uinta Finance or Uinta National did the mailing. I don't know.

But they sent thousands of letters out daily to the public telling them about their proposition. And they wanted to send out--then they sent out a folded card to return for a salesman to come and tell them more about it. And then they sent a little stock certificate that entitled them to buy so much stock or something.

Question: Was this so-called certificate which you just mentioned, was this printed and entitled 'Stock Right Certificate'?

Answer: Something. There was a little gold seal down in the corner of it. Now, I don't believe that was mailed. As I remember, the salesmen took that personally.

Question: To what persons?

Answer: To the ones who had previously bought stock. They were entitled, because of their having bought stock before. Now, that is as it was coming back to me, that because they had bought stock before, they were entitled to

have another 200 shares or something.

Question: Was that stockholders of the insurance or the finance company?

Answer: Of the finance company.

Question: Of the finance company?

Answer: Yes, of the finance company.

Question: As a matter of fact, the stock could have been sold to anyone?

Answer: Oh, yes.

Question: This so-called stock right certificate then was just a sham to make these stockholders think that they were being given some preferred treatment in the offer?

Answer: I considered it a sales gimmick.

Question: However, it was used to make these stockholders feel that they had a preferential right?

Answer: Yes.

Question: Did you participate in that little fraud or encourage that fraud, Mr. Christopher?

Answer: Yes, I issued those out. They were printed and given to me. I didn't do their--

Question: Whose idea was this? Was it yours or Mr. Maxfield's?

Answer: No. It was Reed's. It sounds a lot worse now than it did then. It sounded like a good idea then for sales. In fact, it was the same thing

that we use in selling books. It is the same thing we had.

Question: Is there a difference between selling books and selling stock?

Answer: Yes, I guess there is.

MR. WADE: Actually, if there was any fraud, it was simply to indicate that they were preferred over other people. They were entitled to do everything the certificate told them they could get. The indication was then that the general public didn't have this right, but they did have the right. Isn't that correct?

Answer: Well, they were offered the first opportunity, yes. It was put out that way. If it is accepted, why, they sign the slip; and then it was next that the general public would have a chance. They were the first ones, I will say, that were contacted.

MR. WEGGELAND: What would you do--you went back to the older customers?

Answer: Yes.

Question: And reloaded them?

Answer: Right.

Question: Wasn't the stock sold by the salesmen on an arrangement whereby if they were still paying for a previous subscription

of insurance company stock--

Answer: It could be by payments.

Question: That one payment could be made to you and the insurance company and the other to Western States Underwriters? Was this done with the consent of the management of Uinta Insurance Company?

Answer: Well, it was their idea.

Question: Now, a great many of your customers made payments either directly to the insurance company or made payments to the finance company?

Answer: Yes.

Question: Why do you suppose that happened?

Answer: I don't know. I honestly don't know why. But there were a lot of them that did.

Question: Wasn't that because the salesmen informed these people that the offering was an offering made by the insurance company?

Answer: No. No. That was one thing. The salesmen, when those salesmen went out the were instructed by myself personally--I remember that--that they were to absolutely give them to understand that it was secondary stock.

Question: But didn't this lead you to wonder when the payments came in to the insurance company rather than to the underwriter?

Answer: I never thought about that. I was irritated.

Question: How did Western States Underwriters get the funds that were paid to the insurance company and the finance company?

Answer: The insurance company, as I remember, generally made a deposit out with a deposit slip and deposit to our account at the Valley State Bank, and then sent us a copy of the deposit slip. Now, Mr. Pierce and Guy Walker can tell you more on that end, because I have never personally handled any of that detail work.

Question: How did you obtain the stockholders list?

Answer: From the Uinta National Insurance and Uinta Finance Company.

Question: Both of them?

Answer: Yes, in fact, I still have a few of the cards left that I have not thrown out.

Question: When a sale was made to a customer, was a confirmation letter mailed to the customer?

Answer: It seems to me there was a letter, a follow-up letter, telling them that we had--you will have to ask the boys. I am pretty sure there was a letter sent from Western

States thanking them.

Question: When did it first appear, Mr. Christopher, that Western States Underwriters was insolvent?

Answer: Well, it was before this date here (indicating). I know that.

Question: Before October 31, 1959?

Answer: Yes, it was before that. Because we tried to get--I tried to get Reed Maxfield to take my note and take the whole deal over.

Question: It was apparent then that Western States would be unable to deliver the stock which was being paid for by customers?

Answer: No, I won't say that, because I still felt that I would get an underwriting which would pay back enough that I could pay for that stock. The one in Idaho, the Farm Securities Coop, or the Farm Coop, or whatever it was called, it looked like one which just couldn't miss, and I would have made enough to have paid this off a number of times over.

Question: But at least for the present it was apparent that the underwriting company was insolvent and it would be unable to deliver all of the stock which it had contracted to deliver?

Answer: Well, we were still getting enough money in and still delivering the stock, even until,

as I remember, even after the first of the year--I don't remember just when. And I just knew that we would have enough that I could take care of the rest of it when it came due.

Question: You were paying for the delivery of the earlier subscribers' stock with the payments made by persons who subscribed later or were paying later?

Answer: Were paying later, that is right.

Question: So that your net situation became gradually darker, rather than gradually improving?

Answer: That is right. It went from ten to fifteen thousand.

Question: What was done to tell the persons who were paying on the stock that Western States Underwriters was insolvent and that the stock might not be delivered?

Answer: Well, we had--I don't remember how that went, whether it was at that time we got the attorney up there on Fourth South close to Fifth East--what is his name? He owns that Executive Office Building up there--

Question: Clyde?

Answer: No. It starts with a W--Wilkinson. Harold Wilkinson. At this time we were trying to make negotiations all of the time with

Uinta or with Reed, and we would get the papers drawn up, and I would say, 'We will come in and sign them.' Well, Mr. Wilkinson would send a letter out to the stockholders and say: 'We are trying to get this thing straightened out, so we can get your stock.' And then Reed would say, 'I have changed my mind, I am not going to sign it.' As I can remember, there was seven or eight times we got the papers drawn up and he was going to release his signature or put a mind down to California, and I had him talk personally to Allan Weeder in New York.

Question: We will go into these negotiations later.

Answer: Oh, all right. Pardon me.

Question: Was the money earmarked that came in on payments for delivery to certain persons or have the stock delivered to that person?

Answer: It was all put into the bank account.

Question: It wasn't earmarked?

Answer: No.

Question: I think in some cases letters were sent to accounts which were delinquent, which offered them a refund less 15 per cent?

Answer: Yes.

Question: Did they go out to all delinquent accounts?

Answer: As they became delinquent accounts, for a while it went to all of them.

Question: Was any money ever paid to persons?

Answer: Oh, yes.

Question: On what contractual relation did you feel that you had a right to offer people their money back less 15 per cent?

MR. WADE: I would like to interrupt there. Was this just an offer to those people that they could either accept or not accept?

Answer: Yes.

MR. WEGGELAND: Let's go off the record here.

(Discussion off the record.)

MR. WEGGELAND: Going back on the record now. Was money paid on these offers of refund in every case where the people requested a refund?

Answer: Yes, as far as I know there wasn't one that was ever rejected, as long as we had the money to pay.

Question: Now, it appears, Mr. Christopher, that on these so-called delinquent accounts there has been received $28,701.54, and there was owing to Western States Underwriters

$46,041.96. Does Western States Underwriters have $28,701.54?

Answer: We haven't got anything.

Question: If $46,000 were paid up, could you come up with about $75,000 worth of stock to deliver to these people?

Answer: Well, it depends on whether they will do as they have said before that they would do--accept my notes or anything I have got as collateral and give me the stock, yes. Is that figure about seventy-five--how much?

Question: $75,000.

Answer: $75,000.

Question: Were these customers told that they had a full year to pay for their stock before any forfeiture would be taken, or that they had a full year before they had to pay for their stock?

Answer: I think it was written right in the contract that they had to pay so much down and so much a month.

Question: Besides this, were you ever informed that salesmen had made this agreement with customers?

Answer: Yes, that was the agreement, that they had a year; or in those cases where there were alternate payments with the stock they originally bought, that it would go over a year.

MR. WADE: I would like this to keep the record straight, because I don't understand it, and I don't think anyone reading the record would. Does that mean they have a year in addition to the written terms of the contract?

Answer: No.

Question: To the regular terms we are adding one year?

Answer: The written terms? Is that what you mean?

MR. WEGGELAND: Were you ever told by a customer either personally or by letter that salesmen had represented that other than the terms and conditions of the contract, that they had a full year more to pay for the stock?

Answer: In addition to the--

Question: To pay for the stock, period, beyond the terms the contract provided?

Answer: I don't know. Now, I don't know.

Question: That has never come to your attention?

Answer: If it did, I don't remember. I don't. Now, of course, Mr. Pierce answered all of the letters. Now, he would know. If you will ask them, he will know that.

Question: It appears, Mr. Christopher, that some amounts were immediately refunded

or refunded other than on a refund letter as referred to previously. What were the circumstances that would occasion these refunds?

Answer: I don't know, unless it was sympathy or something. I don't know. Ask Mr. Pierce, because I told them that they should handle that in the way that they saw fit, because they were right at the pulse of it all the time, whereas I was out all of the time trying to line up additional underwritings.

Question: As concerning those accounts that were actually paid up and on which stock remains undelivered, do you know how much stock remains, in retail value, what Western Underwriters will have to purchase for delinquents?

Answer: Wasn't that $75,000--didn't that cover all of the stock?

Question: Not according to our calculations. It appears from our calculations that $54,810 retail price has been paid in to Western States Underwriters in accounts in which stock has not been delivered,

Answer: Besides the $75,000?

Question: That is correct.

Answer: Oh, it could not be. That would be around $125,000. No.

Question: At least, that is the information we

obtained from the examination of your records.

Answer: Check that up with Mr. Pierce.

Question: Does Western States Underwriters have $54,810?

MR. WADE: Mr. Weggeland, I have not seen the records, of course, but where does this forty-six from twenty-one some odd thousand you mentioned before, what relationship does that have to the $54,000 you are mentioning now and to the $75,000 that you mentioned before? I would like to have that clear in the record.

MR. WEGGELAND: Some accounts are delinquent. This agreement says that we had some accounts here on which stock will be delivered, and some accounts are owing to Western States.

MR. WADE: How much is that?

MR. WEGGELAND: There is $64,041.96 to be paid to Western States on these accounts--

MR. BARKER: May we check that figure? It says forty-six thousand in the record.

THE COURT: You read sixty-four.

THE WITNESS: The answer is:

MR. WEGGELAND: There is $46,041.96 to be paid to Western States in these accounts, and $28,701.54 has been paid.

Answer: Oh, I was adding those two together.

MR. WADE: Oh, I see. That has been paid on these delinquent or other accounts?

MR. WEGGELAND: In this series of accounts.

MR. WADE: So that if this money were paid, the total stock to be delivered on those delinquent accounts would be the total of those two?

MR. WEGGELAND: That would be the retail price.

MR. WADE: What does that total up?

MR. WEGGELAND: I don't have it. It is about $75,000.

MR. WADE: And that is the approximately $75,000 you are talking here about; is that correct?

MR. WEGGELAND: Yes. Some accounts have been fully paid, and there is a present duty, according to the terms of the purchase contract, to deliver the stock

MR. WADE: That is $54,000?

MR. WEGGELAND: At retail.

MR. WADE: And this is fully paid and not delivered, is that correct?

MR. WEGGELAND: At least according to the information that Mr. Smith has obtained.

MR. WADE: How much worth of stock has been delivered that has been fully paid?

MR. WEGGELAND: We don't want to discuss that right now.

MR. WADE: I just wanted to know whether any of that was included in this $54,000 for the record.

MR. WEGGELAND: No.

MR. WADE: I just wanted the record clear.

Answer: That would be a little over eighty thousand that are not delinquent.

Question: Mr. Christopher, we will not talk about the books and records of Western States Underwriters. It appears that from March 1959 to May 1960 you were personally paid about $15,801.37.

Answer: It could be.

Question: And your wife Della was paid $7,701.30.

Answer: That would be both of us together. That is the way it is. When she was paid, it was because I was out of town.

Question: As I understand it, there were checks in those amounts made to either you or Mrs. Christopher?

Answer: It could be.

Question: So that amounts in excess of $23,000 were paid?

Answer: That's right.

Question: Was this considered reasonable payment for your services?

Answer: Well, just for my services? I think when you go through the checks you will find the very biggest part of that was for expenses. We live very modestly.

Question: Were you paying the expenses of Western States Underwriters out of your personal income?

Answer: I was paying the travel expenses while I was out trying to rake up underwritings, and where I was out trying to make money, yes.

Question: It also appears that $4,485 was paid during this period of time in travel expenses by Western States Underwriters?

Answer: Yes. It could be more than that.

Question: It appears that you traveled quite frequently?

Answer: I traveled a lot, and I paid for other men traveling on some of the business deals that I was trying to promote.

Question: Now, Western States Underwriters was then attempting to secure underwritings or brokerage work outside of the state of Utah?

Answer: That is right.

Question: And was Western States Underwriters a registered broker dealer?

Answer: Well, now the ones outside of the state, when I went down to Nevada--

Question: Just answer my question.

MR. WADE: I direct you to answer fully, not 'yes' or 'no' but answer fully for the record. I want the record to be complete.

Answer: When I went down to Nevada I was working as a sales manager for an underwriting in our name. When I went to Idaho it was the Farm Coop, which does not come under any jurisdiction of any securities commission, state or federal, because of being a coop. And on the other deals when I was in Central America it was on gold sales to Switzerland, which I now have the commissions coming to me on for $150,000 that are due me now. That was to get money to pay back these stock deficiencies.

Question: Did you sell stock in Nevada?

Answer: Yes.

Question: Did Western States Underwriters sell stock in Nevada?

Answer: No.

Question: Did the salesmen of Western States Underwriters sell stock in Nevada?

Answer: No. As I remember, that was Nevada Enterprises.

Question: But it was the salesman?

Answer: It was the same salesman.

Question: It was you?

Answer: It was me, yes.

Question: And it was the same situation in Idaho, is that correct?

Answer: Well, in Idaho I was--

Question: It was the same salesman, and it was you?

Answer: Well, I guess so.

Question: And the same situation in Arizona?

MR. WADE: I would like for the record--you say in Idaho and Arizona. What company did he sell stock for?

Question: What company were you selling stock for in Arizona?

Answer: In Arizona it was Uinta Finance of Arizona. I was sales manager for them.

Question: Reed Maxfield was president of that company?

Answer: Yes. He was one of the officers.

Question: Nevada Broadcasters, Inc.?

Answer: Yes.

Question: Of Nevada. Was Mr. Maxfield associated with it?

Answer: Yes, and so was Mr. Hulbert.

Question: Was Mr. Bob Hughes associated with it?

Answer: Yes.

Question: And Mr. Hulbert, the recent Insurance Commissioner?

Answer: Yes.

Question: And several other persons?

Answer: Yes.

Question: It also appears that there was travel in California. What were you in California for?

Answer: That was on this gold deal sold to Switzerland.

Question: Explain that.

Answer: There was gold for sale in various states throughout Mexico and Central America. You buy that gold, and there is an override on it. We have a buyer that buys it in Switzerland. We sold from Mexico two million ounces of gold to the Swiss Government, and my share of the commission was $150,000. And that has been held up. Mr. Weeder, the man who owes it to me, talked to Reed Maxfield and Bob Hughes

and myself on a conference line and guaranteed that I had that coming and that we even had--that the buyer and seller were under $300,000 bond each to assure the sale of it being consummated and that I would be paid from the bondsmen if I wasn't paid from the sale itself. So I was bound to get it, and they were going to release the stock at that time.

Question: Were you acting in this capacity as an officer of Western States Underwriters?

Answer: Yes, yes, I was.

Question: Your expenses were paid by Western States Underwriters?

Answer: Yes.

Question: Now, there is also travel in Oregon. Was that in connection with underwriting?

Answer: That was it. I was hunting--no, not underwritings. That was on the gold also.

Question: It appears that car expenses on a Jaguar automobile were paid by Western States Underwriters?

Answer: That was the automobile that I operated in myself. That was my own car.

Question: Do you drive a Jaguar automobile?

Answer: Not any more. It was an old one that I had, and I sold that before I went to Panama.

THE COURT: Thank you sir. What page are

you on?

THE WITNESS: 48, sir.

THE COURT: Would you like to have a brief break now? Let's take a ten-minute recess, folks.

(Recess)

THE COURT: Proceed, sir.

THE WITNESS: There is also a travel or credit card payment in a considerable amount made by Western States Underwriters.

Answer: American Express Company.

That was for this travel. Any traveling that I did, Mr. Weggeland, was to try to sell something or promote something to make some money to pay and get these people their stock back. That is what it was for.

Question: I have a pair of agreements which we will incorporate in the record as Exhibits 8 and 9. It appears to be the purchase by you of an interest in mining properties in California from Pioneer Investments, and another which appears to be an agreement relating to the proposed sale of those same properties to Uinta Finance Company.

Answer: It wasn't to be a sale. It was to be put up as collateral security.

Question: That is right. It was to be put up as security?

Answer: Yes.

Question: Did Uinta Finance Company ever proceed on that second agreement?

Answer: No. They said, 'You get the papers made up,' and then they would O.K. them, and they were to sign them, and then I was to sign them.

Question: Did you ever carry these properties in your own name?

Answer: No. They were in the name of Pioneer.

Question: Why was that?

Answer: Because he had done the negotiating, and he had already purchased them, and then I came in as a partner back in about--I don't know--in '58, I think, or '57 is when we first started. I guess it was. But it was just nip and tuck trying to hold the thing together. But he would not take that as security for it, and we had geological reports from men who are responsible.

Then there are some deletions.

Question: Did you continue payments after it became apparent that Western States Underwriters was insolvent?

Answer: Yes, to keep going, to keep operating, to try and get some additional business or

something to pay back.

Question: How closely did you supervise the salesmen who sold the stock?

Answer: Just as closely as I could. I gave them--we had salesmen's meetings once a week, and I gave them instructions, and we always had a sales lesson prepared; and they had to report in to whom they had sold the stock, and how much, and how much down.

Question: Did you maintain any supervision over the representations that they made?

Answer: We told them what to tell, yes.

Question: Did you ever check on any of the customers to see if they were telling the truth?

Answer: No. Yes.

Question: They weren't selling with any literature?

Answer: I did on one man. One man came in, and he was very, very angry, and he said that one of the salesmen had come in and told him, he said, 'You better get some of this stock, because your brother bought a big block of it.' And he said, 'If my brother has bought it, I will get it.' So the next day after he bought, he called his brother, and his brother had never bought. So I called this salesman in, and I said, 'Let's get this thing straight.' And he said, 'He

got it all mixed up.' And I said, 'If I get one more complaint, you are through.' That is one case that I do remember.

MR. WEGGELAND: Do you have any questions that you would like to propound, Mr. Wade?

MR. WADE: No, sir.

MR. WEGGELAND: I want to thank you for coming in, Mr. Christopher, and Mr. Wade.

Let the record show that this examination is concluded at 11:30 a.m.

Whereupon, at the hour of 11:30 o'clock a.m. on Tuesday, September 27, 1960, the examination of the above-named witness was concluded.

Shall I read the certificate, your Honor?

THE COURT: I don't believe so, unless counsel wishes.

MR. WINDER: The Government does not desire it.

MR. BARKER: We do not desire it.

THE WITNESS: That concludes it.

THE COURT: Very well, and thank you, Mr. James.

MR. WINDER: Thank you.

THE WITNESS: Am I excused?

THE COURT: Yes, you are.

(Witness excused)

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CASE NO. 276

IN THE SUPREME COURT OF THE UNITED STATES

October Term

REED R. MAXFIELD,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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UNITED STATES OF AMERICA

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals

for the Tenth Circuit

Comes now defendant Reed Maxfield and respectfully petitions the Honorable Supreme Court of the United States for rehearing of his Petition for Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 22, 1966.

OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. A 29-41) is reported at 360 F 2d 97.

JURISDICTION

On May 24, 1966, Mr. Justice White extended the time in which to file a petition for a writ of certiorari to and including June 21, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for certiorari was denied October 10, 1966. This petition of defendant Reed Maxfield for rehearing of the petition is filed Friday, November 4, 1966.

QUESTION PRESENTED

1. Whether the defendant Reed Maxfield's constitutional due process rights of freedom from imprisonment and from deprivation of property were granted by conviction of a fraudulent scheme to sell securities to members of the public as charged in the first eight counts of the indictment under 15 U.S.C. 77 q founded on the uncorroborated, confession given by deposition—testimony of Ray Christopher and upon a simple instruction that it be considered by the jury only against the declarant?

2. Whether the erroneous view of the Tenth Circuit Court of Appeals that Western States Securities Company was merely the agent of Uinta Finance Company to sell 242,000 units of Uinta National Insurance Company rather than the purchaser of said stock to sell its own stock on its own account was prejudical to the rights of defendant Reed Maxfield on the question of a scheme to defraud?

3. Whether the time has now arrived to reexamine the rule of *Delli Paoli v. United States* 77 S.Ct. 284, 351 U.S. 245 decided January 14, 1957, by a five to four decision that confessions of one alleged co-conspirator are admissable in a trial of co-defendants if the Court merely, barely and simply instructs the jury that the confession is to be considered by them only as applying to the declarant, since there are now three new members on the Court Mr. Justice Stewart, Mr. Justice White and Mr. Justice Fortas?

4. Was it reversable error not to give an instruction on corroboration?

STATEMENT

Petitioners were charged jointly in the first eight counts with a fraudulent scheme to sell securities through a Utah corporation owned by the Christopher family namely, Western States Securities Company and in counts 9 and 10 of using the mails in furtherance of their joint fraudulent scheme, (18 U.S.C. 1341) and in count 11 of a conspiracy to perpetrate said joint, fraudulent scheme upon purchasers of Uinta National Insurance Company stock as charged in the earlier 10 counts (18 U.S.C. 371)

The jury found Reed Mexfield not guilty of using the mails to defraud as charged in counts 9 and 10 and also not guilty of any conspiracy or fraudulent concert, common purpose, agreement or scheme to sell said insurance company stock to members of the Utah public.

The only testimony that linked co-defendant Maxfield to the selling of its own National Insurance Company stock by the duly licensed brokerage corporation, Western States Securities Company and its Sales Manager Ray Christopher and its many salesmen was the deposition-confession of Ray Christopher admitted over objection of defendant Reed Maxfield.

PROMOTIONAL STOCK OF REED MAXFIELD WAS WITHIN USUAL AND REASONABLE LIMITS

Between November 1, 1958, and January 19, 1959, or about said dates Uinta National Life Insurance Company lawfully sold its stock to the public in the contract amount of $1,515,000 of which a final sale of stock of 250,000 units was sold for $250,000 (appellant's Reply Brief p. xii) less 15%, the latter figure being the allowable sales commission on all stock. There were very few cancellations prior to March, 1959.

In addition to the above public sales Reed Maxfield early purchased Uinta National stock for $125,000 which with another $10,000 also furnished by Maxfield was used to qualify Uinta National as a Legal Reserve Life Insurance Company in Utah.

When the public sale had been completed by January 19, 1959, Mr. Maxfield sold to Uinta Finance Company the Uinta National stock he originally purchased for $125,000 for the sum of $242,000. This was with full knowledge of the directors and unanimous consent of the stockholders at a specially called stockholders meeting.

At this time Uinta Finance Company had approximately 5,000 stockholders and Reed Maxfield held about 3% of the Finance Company stock. Thus Reed Maxfield secured a promoter's profit of about 9 percent above the total sales of Uinta National stock to the public. This 9% stock watering is not unusual or unreasonable for promoter's profits for advancing the original risk capital on a million and a half capital stock sale.

DISTRICT COURT OF APPEALS UPHELD THE CONVICTION AGAINST REED MAXFIELD ON THE ERRONEOUS GROUND THAT WESTERN SECURITIES COMPANY WAS AN AGENT FOR INSTEAD OF A PURCHASER FROM UINTA FINANCE OF THE STOCK WHICH THE LATTER OWNED IN UINTA NATIONAL INSURANCE COMPANY

At the close of the second paragraph of the Circuit Court of Appeals decision (360 F.2d 97) the Court says that Maxfield "and Christopher offered or caused to be offered and sold to investors through the services of Uinta Finance and Western States" the stock of Uinta National. Other erroneous statements of the Court are that Maxfield caused the Uinta National stock of Uinta Finance to be sold through (*instead of the true fact, sold to*) Western States are found in paragraphs 9, 10, 14, and 18 of said decision (Pet. for Writ of Cert. pp. 34, 35, 37 and 38.) In paragraph 9 of said decision the Circuit Court erroneously writes:

> *"It (Western States) immediately entered into a contract for the sale of Uinta National stock . . ."*

The truth is that the contract was not an agency contract for the sale of Uinta National stock for Uinta Finance Company, but a contract to buy said stock from Uinta Finance Company and to sell it for the purchaser's own account. (See: Plf's Exhibits 191 and 203, the latter showing a Utah District Court Decision that the said contract was "a conditional sales contract, title remained in Uinta Finance Company until Western States Company paid for the stock.")

Thus the entire theory of the government's case was wrongfully adopted by the Circuit Court of Appeals as an agency transaction, and the evidence conclusively shows an at-arms-length contract of conditional sale to Western States Securities Company, in which Reed Maxfield had no ownership, interest or control, except as provided in the said agreement of purchase and sale that stock would be delivered when paid for by Western Securities.

REED MAXFIELD WAS FOUND GUILTY BECAUSE OF EMBEZZLEMENTS BY RAY CHRISTOPHER, AND CHRISTOPHER'S DEPOSITION-CONFESSION WRONGFULLY IMPLICATING MAXFIELD

The crux of this case is that Ray Christopher secured for Western Securities $182,000 by purported sales of Uinta National Insurance Company stock. (Tr. 56-58, 77-80). Of the $182,000 defendant Ray Christopher, by his own admission, misappropriated $88,000 in cash (R.1409). He could not deliver stock for this amount because Western States did not pay to Uinta Finance those

funds secured from sales which was a condition precedent to securing Uinta National stock from escrow to deliver to purchasers. Certainly Reed Maxfield should not be held liable for losses to customers caused by peculation of Ray Christopher. Yet it was the confessions and the believed-to-be self-serving declarations of peculator Ray Christopher which was admitted as the damaging evidence on which the jury found Reed Maxfield guilty.

A NON-EMBEZZLING CO-DEFENDANT SHOULD NOT STAND CONVICTED ON THE QUESTIONABLE AND REPUDIATED TESTIMONY IN A DEPOSITION BY A CONFESSING EMBEZZLOR UNLESS SUCH TESTIMONY IS CORROBORATED BY OTHER TESTIMONY BEYOND A REASONABLE DOUBT

The evidence in this case shows beyond a reasonable doubt that the very substantial loss to stockholders and the downfall of the two Maxfield companies was percipitated by the embezzlement by Ray Christopher of about $88,000.00 from Christopher's own company, Western States Securities. The loss to stockholders did not result from the 9% stockwatering by promoter Reed Maxfield several months prior to the Christopher embezzlements.

In criminal cases wherein a confessing felon repudiates under oath the part of his confession implicating an alleged accomplice, a new separate trial should be given to the implicated do-defendant as necessary for his constitutional guaranty of a fair trial. In this case the confessing co-defendant Ray Christopher signed an affidavit

one month and eight days after the taking of his deposition (R. 1180-1181) repudiating and giving the lie to, his deposition confession wherein it implicated Reed Maxfield as having any part in Western States Securities Company operations (Exhibit 130).

INSTRUCTION GIVEN WAS INADEQUATE TO PROTECT RIGHTS OF THE ACCUSED CO-DEFENDANT MAXFIELD TO A FAIR TRIAL

The trial court instructed the jury that the incriminating statements against Maxfield in the Christopher deposition admitted in evidence and read to the jury were not to be considered by the jury as evidence against Maxfield. The futility and evident injustice of this limited type of instruction is boldly illustrated by the fact that the government in its statement of the case given in its brief before the Circuit Court of Appeals cities supposed facts of incrimination from the deposition of Ray Christopher no less than 16 times. (See said Govt's brief, p.4, 2 citations; p.5, 1 cit.; p. 6, 4 cits.; p.8, 3 cits.; p.9, 4 cits.; and p. 11, 2 cits.)

Certainly in cases like this one wherein the confessing co-defendant repudiates under oath the implicating statements in his deposition confession on which the government relies so heavily, a stronger instruction to the jury or exclusion of the deposition confession from the joint trial is called for in the interest of a fair trial.

The trial Court should at least add to its abbreviated instruction as given, an instruction to consider the deposi-

tion only as against the declarant, a further safeguarding instruction to the effect that unless the damaging statements of the confessing co-defendant are found to be corroborated beyond a reasonable doubt by testimony other than that of the confessing co-defendant that the jurors must find the implicated co-defendant not guilty, Smith v. United States 348 U.S. 147. Perhaps the better rule is one of exclusion as argued by the four dissenting judges in the *Delli Paoli* case *infra*.

THE TIME HAS COME FOR REEXAMINATION OF THE DELLI PAOLI CASE

The questions of admission of a co-defendants implicating confession in a joint trial or of providing adequate safe-guarding instructions in such cases are questions of balancing the delicate but vital considerations of fair trial against those of needed protection of society against criminals who act in concert.

Since the 5 to 4 decision in the *Delli Paoli* case *infra* three new Justices have been appointed to the Supreme Court of the United States who still remain as Justices - Mr. Justice Stewart, Mr. Justice White and Mr. Justice Fortas. Also three more states in addition to California have established the rule of exclusion argued for by the dissenting Justices in the *Delli Paoli* case. The new state cases having established the rule of inadmissibility of the implicating or incriminating deposition confession in a trial of joint defendants are: *State of New Mexico v. Tapia* New Mex., 411 P 2d 234 (1966); *State of Arizona v.; Goodyear* Ariz., 413 P 2d 566 (1960); and *State of New; Jersey v. Young*, New Jersey, 215 Atl. 2d 352 (1965).

We quote from Appellants' Reply brief page 10, filed in the Circuit Court of Appeals to emphasize the great temptation on the confessing defendant to gain a benefit by blaming the co-defendant.

The record is quite clear, as appellant Christopher contends, that his deposition taken by Commission attorney Weggeland on September 27, 1960, was induced by hope or promise of reward or benefits from so testifying. Christopher, was told that the Commission was not after him and that he was "a small fish" and in fact, the Commission was after Maxfield (R. 1173, 1166). The language of the deposition of Christopher found at page 1290 of the record clearly supports Christopher's view. It is amply clear that Christopher was happy to be led along on this expedition, for after all, the SEC wasn't after him and the more information he gave involving Maxfield, helped him out of his snare. After off the record conferences, Christopher was extremely lucid for a man suffering from an old head injury with a poor memory (R. 1294).

We further quote from Appellants' brief pages 18 to 20 filed in this Court as follows:

As Justices Frankfurter, Black Douglas and Brennan pointed out in their dissent in *Delli Paoli v. United States*, 77 S.Ct. 284, 351 U.S. 245 (1957):

> *"Prosecutions for conspiracy present difficulties and temptations familiar to anyone with experience as a federal prosecutor. The difficulties derive from observance of the rules governing evidence admissible*

against some but not all defendants in a criminal case. The temptations derive from the advantages of prosecuting in one trial two or or more persons collaborating in a criminal enterprise. One of the most recurring of the difficulties perttains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma against the declarants but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrisically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing the rule of admitting the declaration solely against a declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:

'in effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.' Nash v. United States, 2 Cir., 54 F. 2d 1006, 1007.

It may well be that where such a declaration only glancingly, as it were, affects a codefendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's state-

ment is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to a coconspirator, the petitioner in this case, is no justification for causing such harm. The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial.

CONCLUSION

In conclusion Petitioner Reed Maxfield prays for granting of his petition for rehearing of his Petition for Certiorari to gain a new trial for the reasons:

1. That there is no corroborating evidence that Reed Maxfield had any control, interest, ownership, direction or management whatever of Ray Christopher's brokerage Company - Western State Securities Company.

2. That the defendant was denied a fair trial, because the instruction to the jury merely to disregard the implications of guilt against Maxfield found in Christopher's deposition confession in a joint trial charging a scheme to defraud under the circumstances showing repudiation of that deposition-testimony under oath by Christopher later, was entirely inadequate to cause the jury to erase

from their mind the damaging implication statements of Christopher read to them from his deposition in a joint criminal trial.

3. The entire opinion of the Circuit Court of Appeals, *supra* was decided on the false assumption that Western States Securities Company was selling the stock of Uinta National Insurance Company owned by Uinta Finance Company as an agent of Uinta Finance Company while the undisputed evidence shows that Western States Securities Company was selling its own stock secured by delivery of purchase money to Uinta Finance Company secured from the purchasing public to secure release amounts of said stock held in escrow under a conditional sales agreement as determined by a District Court of the State of Utah.

4. That because of three new Justices now being on the Supreme Court of the United States who may not now go along with the bare majority view in the *Delli Poali* case and because the States are adopting the dissenting view of exclusion of the incriminating deposition-confession of an admitted felon, the time has come for a reexamination of the questions decided in the *Delli Poali* case.

5. It was reversable error not to give an instruction on corroboration.

Dated this 3rd day of November 1966.

Clifford L. Ashton
A. Ladru Jensen
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 276

REED R. MAXFIELD AND JOHN R. CHRISTOPHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 29–41) is reported at 360 F. 2d 97.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1966. On May 24, 1966, Mr. Justice White extended the time in which to file a petition for a writ of certiorari to and including June 21, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted on counts of an indictment charging substantive viola-

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tions when they were acquitted on a conspiracy count.

2. Whether the evidence was sufficient to support the conviction of petitioner Maxfield.

3. Whether the court properly admitted into evidence a deposition of petitioner Christopher with instructions that it be considered only against the declarant.

4. Whether there was error in the jury instructions.

STATEMENT

Petitioners were charged in the United States District Court for the District of Utah with various offenses resulting from a scheme to defraud. The first eight counts charged them with the use of the mails in a fraudulent scheme to sell securities (15 U.S.C. 77q); Counts 9 and 10 charged mailings in execution of a scheme to defraud (18 U.S.C. 1341); and Count 11 charged a conspiracy to commit the offenses in the first ten counts (18 U.S.C. 371). After a trial before a jury, petitioners were convicted on the first eight counts and acquitted on the remaining three counts. The convictions were affirmed by the court of appeals.

The existence of a scheme to defraud is not challenged here although petitioner Maxfield contends he was unjustly found guilty of misdeeds chargeable to Christopher. In brief, the evidence showed that petitioner Maxfield was president and chairman of the board of Uinta Finance Company (Tr. 1517–1518, 573). In October, 1958, he and others formed the Uinta National Life Insurance Company of which he also became president. This company was formed with an initial capital stock of $135,000, of which

$125,000 consisted of stock that Maxfield had purchased by borrowing that sum from the finance company (Tr. 229–233, 238, 654). On January 19, 1959, Maxfield sold 242,000 units of his insurance company stock to the finance company for $242,000 (Tr. 246).

In early 1959, Maxfield negotiated with a broker to resell some of the insurance company stock that had been sold to the finance company. Maxfield said that petitioner Christopher would help to sell the issue. The broker refused, informing Maxfield that an attorney had advised him not to participate in the sale of this stock (Tr. 1012–1016).

In March, 1959, Christopher and others organized a corporation, Western States Underwriters, to sell securities (Tr. 840–841). Christopher had previously been the sales manager for Uinta Finance and Uinta Insurance when the stock of those companies was sold directly to the public (Tr. 88–89). The principal assets of Western Underwriters were 1,200 units of Uinta National Insurance Company stock which Christopher had borrowed from Maxfield (Tr. 456–460, 944–947). Western Underwriters entered into a contract with the finance company to sell part of the insurance stock which had been obtained from Maxfield (Tr. 293, 301–306).

Western Underwriters then commenced selling this Uinta Insurance stock to the public, using salesmen who had previously worked under Christopher (Tr. 91) and sales promotion kits that had been prepared earlier for Maxfield (Tr. 199–202, 207). The commissions from these sales were, except for one small amount, Western's only source of income. The stock

was usually sold to prior investors in Uinta stock at $1.35 per unit, $1.14 of which went to the finance company (Tr. 448–451). These stockholders were solicited with false representations that there had been an increase in the value of the stock and that, as prior investors, they had a special right to purchase some additional stock which would be forfeited if not exercised. They were not informed that the stock offered for sale was formerly owned by the president of the insurance company and had been sold to the finance company (Tr. 56–58, 77–80). Western sold a total of $182,000 of insurance stock. Of this amount, $96,140 of fully paid stock was issued to investors, $54,810 was fully paid but not delivered and $28,566 was partially paid and not delivered (Tr. 1139–1140).

ARGUMENT

1. Petitioners are not entitled to have their convictions on the eight substantive counts set aside merely because the jury acquitted them on the conspiracy count. *Dunn* v. *United States,* 284 U.S. 390; *United States* v. *Dotterweich,* 320 U.S. 277. Since the *Dunn* decision, there has been no conflict among the courts of appeals in this regard. See, *e.g., United States* v. *Dolasco,* 184 F. 2d 746, 749 (C.A. 3); *Canaday* v. *United States,* 354 F. 2d 849, 855–856 (C.A. 8).

2. The evidence against petitioner Maxfield was sufficient even though Christopher and Western States Underwriters made the stock sales to the public. Maxfield was interested in disposing of the stock and he aided Christopher in setting up Western. In addi-

tion, Maxfield knew that the stock which he had recently sold to the finance company for $1.00 per unit was to be immediately resold to the public for more than $1.14 per unit. From these circumstances the jury was justified in concluding that Maxfield understood that the salesmen of Western States would not disclose that they were reselling insurance company stock that had belonged to Maxfield and that they would make false representations to potential customers in order to market the stock at an appreciated price.

3. On September 27, 1960, petitioner Christopher's deposition was taken during the course of an investigation by the Securities and Exchange Commission (Tr. 1290–1350). Christopher was represented by an attorney and was advised that he could refuse to answer questions (Tr. 1291). After holding an extensive hearing (Tr. 1159–1252), the trial judge found that his statements were voluntarily made (Tr. 1253–1259). This deposition was then admitted into evidence, against Christopher only, at the close of the government case-in-chief (Tr. 1287–1289).[1]

The contention of Christopher that his deposition should have been excluded was properly denied. Since there was no custodial interrogation, *Miranda* v. *Arizona* (miscited as *Katzenbach* v. *Morgan*), Nos. 759, 760, 761 and 584, O.T. 1965, decided June 13, 1966, has no application here. In addition, Christopher was represented by counsel and was advised that his statements might be used against him.

[1] The jury was instructed to disregard the statement even as to Christopher unless they found that it was voluntary (Tr. 1290).

Nor was the introduction of Christopher's statement error as to Maxfield. Before this deposition was introduced against Christopher, the government had presented all of its evidence against Maxfield. Both at the time the deposition was admitted and in the court's final instructions, the jury was instructed that this statement was not admissible against Maxfield (Tr. 1287–1288, 1789). See *Delli Paoli* v. *United States,* 352 U.S. 232. Moreover, Maxfield's position as president of the two Uinta companies and his interest in the sale of the stock gave him a clearly defined role in the scheme, which eliminated any serious possibility of confusion in the jury's mind.

4. In detailing the false representations charged in the indictment, the trial judge included the allegation that Western States had represented to investors that state law compels insurance companies to invest assets "in United States bonds or securities which the state considers just as safe" (Tr. 1770). Petitioners, who did not except to this instruction, contend that a misrepresentation of law cannot be a basis of fraud. However, it has been held that misrepresentations of law in a mail fraud case may form the basis of a criminal prosecution. *Lesselyoung* v. *United States,* 18 F. 2d 472 (C.A. 8), certiorari denied, 275 U.S. 535. In any event, as the court of appeals held, this particular representation was not singled out for emphasis and there was therefore no plain error.

Finally, since Maxfield's guilt depended upon his knowing participation in the fraudulent scheme and not solely upon his control of Western Underwriters, the court correctly refused to instruct the jury that

they might consider the false representations as against Maxfield only if they first found that he "possessed the power to direct or to cause the direction of the management policies of Western States Underwriters, Inc." (Pet. 12, see also Pet. 26–27). The trial judge correctly instructed that "[w]hile it is not necessary for the Government to show that in all respects and at all times the defendant Maxfield was and continued in control of the Western States Underwriters, it is essential for the Government to show beyond a reasonable doubt * * * that he devised a plan or scheme or agreed to such plan or scheme to utilize Western States Underwriters to effectuate through false representations a plan to dispose of the stock to the public" (Tr. 1791).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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